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IN THE

Supreme Court of the United States

JOHN K. THORPE, ELISHA E. SPRONG, DARRELL J. VIGIL, SEAN P. LEY, AND HECTOR JUAREZ, ON BEHALF OF THEMSELVES AND A PROPOSED CLASS OF ALL OTHER TAXPAYERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF COLORADO AND M. MICHAEL COOKE, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE AND TAX COLLECTOR, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a State enforce a sales tax refund statute with residency requirements that facially excludes residents who paid taxes during the refund year solely because they moved into or out of the State within the full-calendar-year?

2. Is there a violation of citizenship where a State statute that refunds excess tax revenues facially excludes citizens of other States who paid taxes during the refund year from participating in the refund because they are non-residents?

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Petitioners John K. Thorpe, Elisha E. Sprong, Darrell J. Vigil, Sean P. Ley, and Hector Juarez ("Petitioners") respectfully petition for a Writ of Certiorari for review of the judgment of the Court of Appeals of the State of Colorado.

OPINIONS BELOW

The October 21, 2004 opinion of the Court of Appeals of the State of Colorado is reported at 107 P.3d 1064 (Colo. App. 2004) (App. A).[1] The opinion of the District Court, City and County of Denver, Denver, Colorado (No. 99cv2974 Dec. 19, 2002) is unpublished (App. B).

STATEMENT OF JURISDICTION

The Supreme Court of Colorado denied without opinion Petitioners' timely Petition for a Writ of Certiorari on February 14, 2005. *See*, *Thorpe v. State of Colorado*, No. 04S796 (Colo. Feb. 14, 2005) (2005 Colo. LEXIS 125) (App. C). The jurisdiction of this Court rests on 28 U.S.C § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

The Privileges and Immunities Clause of the United States Constitution, U.S. CONST. art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

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[1] "App." refers to the Appendix filed with this Petition for a Writ of Certiorari.

This Court has long recognized U.S. citizens have a constitutionally protected "Right to Travel" which

> protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500 (1999).

Amendment XIV of the United States Constitution, U.S. CONST. amend. 14 , § 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Colorado statute, which Petitioners seek to have declared unconstitutional, is C.R.S. § 39-22-120 (as enacted and amended).[2]

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[2] *See,* App. D. Amendments to C.R.S. § 39-22-120 have not affected the eligibility restrictions at issue, but primarily focus on distributions to eligible Residents.

STATEMENT OF THE CASE

This Petition seeks Certiorari to review the opinion and judgment of the Court of Appeals of the State of Colorado, an intermediate appellate court (the "Court of Appeals"). The Court of Appeals held that C.R.S. § 39-22-120 (as enacted and amended) (hereinafter the "Sales Tax Refund Statute"), a statute enacted due to the TABOR Amendment to the Colorado Constitution, art. X, § 20, was constitutional under the United States Constitution. The Court of Appeals found that none of four key U.S. Constitutional principles — the Privileges and Immunities Clause, the Commerce Clause, the Right to Travel, and the Equal Protection Clause — were violated. This Petition seeks review of the Court of Appeal's decision under all four principles.

The procedural history of this case is straightforward. On or about August 26, 1999, Petitioners filed a putative class action lawsuit in the District Court, City and County of Denver, Colorado, challenging the Sales Tax Refund Statute under the United States Constitution and the Colorado Constitution. All constitutional issues raised herein were timely raised and fully briefed to the District Court. Cross-Motions For Summary Judgment were filed by the Petitioners and the State of Colorado ("State" or "Colorado"). By Order dated December 19, 2002, the District Court ruled that the Sales Tax Refund Statute was not unconstitutional. The District Court Order is attached (App. B). Petitioners timely filed a Notice of Appeal of the District Court Order to the Court of Appeals. The constitutionality of the Sales Tax Refund Statute was fully briefed to the Court of Appeals. In an Opinion dated October 21, 2004, the Court of Appeals affirmed the District Court Order (App. A). Petitioners timely filed a Petition for Writ of Certiorari with the Supreme Court

of Colorado, seeking review of the Opinion of the Court of Appeals regarding the constitutionality of all issues raised herein regarding the Sales Tax Refund Statute under both Constitutions. By Order dated February 14, 2005, the Supreme Court of Colorado denied the Petition for Writ of Certiorari (App. C). This Petition seeks review of Colorado's Sales Tax Refund Statute under the United States Constitution.

In order to appreciate the context of Colorado Sales Tax Refund Statute, it is necessary to understand Colorado's TABOR Amendment (COLO. CONST. art. X § 20 (1992, amended 1995, 1996)). In 1992, Colorado, by a citizen-initiated referendum, enacted this Constitutional Amendment to limit and control the growth of government spending. The Constitutional Amendment, also known as the Taxpayer's Bill of Rights or TABOR, generally requires that in the event Colorado collects tax revenue greater than the previous year's revenue, the excess revenue must be refunded before the end of the ensuing fiscal year. In fiscal year 1996-1997 Colorado generated excess revenues, and TABOR's refund provisions became necessary for the first time. In response, a special session of the Colorado legislature enacted C.R.S. § 39-22-120 which provided sales tax refunds only to full-calendar-year resident citizens, automatically disqualifying other resident and non-resident taxpayers. Each fiscal year thereafter through 1999-2000, the State has amended the Sales Tax Refund Statute to return newly generated excess revenues in the same manner.[3]

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[3] Revenues are actually earned in a fiscal year, but eligibility is based upon a calendar year. For example, the excess revenues for the July 1, 1996 through June 30, 1997 fiscal year were distributed to 1997 full-calendar-year residents.

In this context, the relevant facts are simple and were, for the most part, set forth in the District Court's Order and accompanying appendix:

The TABOR Amendment and the Colorado Refund Statute

> The TABOR Amendment [to the Colorado Constitution] mandates the yearly return of excess state revenues ("surplus") as a means of limiting the annual growth of state fiscal year spending. (Colo. Const. Art. X, Section 20). Fiscal year spending is defined as comprising "all district expenditure and reserve increases," with certain exceptions as noted at Section (2)(e) of the TABOR Amendment. The maximum annual percentage change in state fiscal year spending is determined by a formula that ties inflation to population growth. TABOR also provides that "[s]ubject to judicial review, a district may use any reasonable method for refunds ...including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return."...
>
> For fiscal years 1996-1997, 1997-1998 and 1998-1999, the State generated excess revenues that it was required to refund under the TABOR Amendment. To accomplish the refund, the Legislature enacted the [Sales Tax] Refund Statute, which designates the refund as a sales tax refund. Persons qualified to receive the sales tax refund are identified C.R.S. 39-22-120 (2) (a) (I-IV). Generally, in order to qualify for the refund, a person must have been either: (a) a full tax year domiciliary who filed a state tax return

for either payment or a refund, (b) a full tax year domiciliary 18 years or older; .... The status of "home," residency," and "domiciliary," which triggers the refund, is full calendar year residency, as manifested by in-state physical presence and/or "intent" to be a Colorado resident. Non-residents and part-year residents are thus excluded from receiving a [sales tax] refund.

The excess revenue pool from which the refund is drawn is collected from a wide variety of fees and taxes, including sales tax and income tax. The excess revenue refund is administered and distributed through the state income tax system. The amount of any given individual's sales tax refund is determined by the amount of state income taxes paid. Because the Plaintiffs are non-residents or only part-time residents, they do not qualify for the challenged refund.

Plaintiffs and Their Claims

Plaintiffs are members of a proposed class which includes (a) "all persons who have been subjected to levy, collection and payment of the State of Colorado's sales tax used to issue refunds, and who have not been refunded a portion of the tax because they did not meet the domicile, durational or other eligibility requirements of the sales tax refund statute," and also includes, (b) "all persons who are or were required to file and pay Colorado state income taxes and who were ineligible to receive a

> sales tax refund because they did not meet the domicile, durational or other eligibility of the sales tax refund statute."

App. B.

Although Colorado had many constitutional ways to comply with TABOR, some of which are expressly set forth in TABOR, the State chose an unconstitutional way that is discriminatory "on its face." The Colorado legislature enacted the Sales Tax Refund Statute, which refunds the excess revenue in the guise of a sales tax refund only to its full-calendar-year State residents ("Preferred Residents"). The Sales Tax Refund Statute excluded other State residents ("Lesser Residents") and non-residents ("Non-Residents") who were required by law to pay and did pay the very taxes being "refunded." *See,* Sales Tax Refund Statute (App. D).

The Preferred Residents and the Lesser Residents are identical "residents" in all respects, except that Lesser Residents moved out of or into the State sometime during a given year, even up to the last day of the year. Colorado tax law thus effectively applies two inconsistent definitions of the term "resident" — one for purposes of paying taxes, and another for purposes of receiving a refund of those taxes paid. This classification scheme statutorily results in many citizens becoming second-class citizens. The Sales Tax Refund Statute creates a universe of all State residents who are required to pay taxes (be they income and/or sales taxes) and a much smaller universe of preferred State residents that may receive tax refunds. Non-Residents who pay sales taxes and/or income taxes to the State, among other taxes, are "lumped in" with the Lesser Residents in this classification scheme.

Colorado has refunded $2.3 billion dollars in sales taxes solely to a sub-set of residents — primarily those who filed income tax returns, ignoring Lesser Residents and Non-Residents who also filed income tax returns and paid substantial income and/or sales taxes to the State. Petitioner Vigil is typical of nearly 210,000 Lesser Residents annually who have been statutorily denied participation in the Sales Tax Refund simply because they were not full-year residents for 365 days in a given calendar year. Mr. Vigil moved to Colorado in early 1997 and lived and worked in Colorado for approximately ten months of that year, contributing meaningfully to the economic activity in the State and to its tax base. Although taxpayers like Mr. Vigil were "residents" under State law for purposes of paying Colorado income taxes, and they paid substantial income taxes and sales taxes to Colorado, they were not "residents" for the purpose of receiving the Sales Tax Refund.

Petitioners Ley and Juarez are typical of approximately 78,000 non-residents annually whose jobs are in Colorado and who work in Colorado, paying substantial sales taxes, income taxes, and all other applicable taxes to Colorado but reside primarily in neighboring states. Even though their Non-Resident income earned in Colorado is equally taxed by Colorado, and they are required by law to file Colorado income tax returns, Messrs. Ley and Juarez, are denied participation in the Sales Tax Refund simply because they are Non-Residents. Thus, U.S. citizens of neighboring states cross the State line almost every day in and for gainful employment in the State, contributing significantly to commerce and economic activity in the State, yet are penalized simply because of their residency.

Petitioners Thorpe and Sprong are typical of millions of Non-Residents who travel into Colorado temporarily, including annually approximately 15,000 non-resident college students and 25,000 non-resident military personnel stationed in Colorado. These Non-Residents contribute substantially to Colorado's economic base by participating in tax-generating activities such as shopping, housing, dining, and entertainment. Tourism represents the second largest Colorado industry — approximately $7 billion dollars annually — and is an integral part of both interstate commerce and tax revenue in Colorado, particularly as it relates to the ski industry. These Non-Residents pay substantial sales taxes to the State, yet they are denied a Sales Tax Refund, or even a sales-tax holiday or rate reduction as specifically designated by TABOR.

Colorado initially determined that the surplus revenues to be refunded pursuant to TABOR were generated by economic growth in Colorado, particularly in the high-paying, high- tech fields like telecommunications, which resulted in increased migration into Colorado. This increased workforce resulted in a large growth in the income taxes paid to the State. The State decided that while the excess growth in income tax revenues primarily created the TABOR surplus to be refunded, the Sales Tax Refund would be the distribution method. Colorado tied the refund to its income tax system by using the State income tax forms for distributing the Sales Tax Refund and basing the refund amount on income tiers.

The Sales Tax Refund Statute facially discriminates against State taxpayers who move into or out of the State during any taxpaying year. The Sales Tax Refund Statute also facially discriminates against Non-Residents who pay

substantial income and/or sales taxes to the State. Petitioners challenge the facially discriminatory Sales Tax Refund Statute under the United States Constitution. For the reasons set forth below, the analysis by the Court of Appeals is flawed, specifically by turning a "blind eye" to clear precedent from this Court. Accordingly, this Court should grant Certiorari, and the Sales Tax Refund Statute, C.R.S. § 39-22-120 (as enacted and amended), should be declared unconstitutional.

REASONS FOR GRANTING THE PETITION

Colorado has purposely excluded certain tax-paying residents and all non-residents from receiving their portion of $2.3 billion dollars in sales tax refunds distributed from 1998-2001 because they are not full-calendar-year residents. The State admits that the result is a higher effective tax rate for certain residents and non-residents. The Colorado Appellate Court denied relief because it opined: (i) the burdens placed on these groups from not receiving potentially greater than $100 million dollars in refunds is considered small compared to the total distribution; (ii) the statutory language shows no malicious discriminatory purposes; and (iii) the excess revenues are a "local evil" caused by Non-Residents and cured by discriminatory distribution. In clear violation of Supreme Court precedent, the Colorado Courts ignored or misapplied the rigorous standards of review required for the Constitutional issues raised over the facially discriminatory statute.

Colorado's Sales Tax Refund Statute facially discriminates against: (a) new residents that arrive in the State; (b) "old" residents that leave the State; and (c) non-residents, many of whom work in Colorado and pay substantial sales and/or income taxes. The reasons for

granting Certiorari are — in part — stated in *Saenz*. *Saenz*, 526 U.S. 489. In *Saenz*, this Court, also in the context of a durational residency requirement, stated that "[a]lthough the decision of the Court of Appeals is consistent with the views of other federal courts that have addressed the issue, we granted certiorari because of the importance of this case." *Id.* at 498; (*see also,* n. 9 citing federal and state cases addressing durational residency requirements, particularly those holding that such requirements are a penalty on the right to travel). Likewise, this case is important both for Colorado taxpayers and taxpayers whose states are considering TABOR-style reform including tax refund statutes. This Court has a history of addressing the constitutionality of durational residency requirements as well as purposeful discrimination by one State against citizens of another. Certiorari should be granted because clear precedent from this Court was ignored by the Court of Appeals.

The Colorado Supreme Court's refusal to grant a Writ of Certiorari is telling, given that substantial constitutional issues have been raised and substantial economic activity and commerce are affected. The Colorado Supreme Court abdicated its constitutional responsibility by essentially affirming the Court of Appeals without opinion. The lower courts ignored and/or refused to apply controlling precedents from this Court and the Colorado Supreme Court, including the appropriate standard of review, and turned a "blind eye" to the multitude of non-discriminatory, less-restrictive alternatives for achieving the TABOR objective — some of which are expressly set forth in TABOR. Review is all the more important because this Court, in exercising its Certiorari jurisdiction, has long recognized that it has a special responsibility in assuring strict allegiance to Commerce and Supremacy Clause principles, not to mention the Right to Travel free of burden or penalty.

Review is further necessitated because, absent review, the State's egregious practice of ignoring this Court's precedent will go unabated, encouraging other state courts and legislatures to do the same. The State's unraveling of the privileges of citizenship may easily be extended by Colorado to other areas unless this Court intervenes. The Appellate Court shunned its role as guardian of constitutional rights by approving a facially discriminatory statute as "incidental discrimination" so long as "the legislative purpose was to refund excess revenues to the people who paid the most money into the revenue fund." *Thorpe v State of Colorado*, 107 P.3d 1064, 1069-70 (Colo. App. 2004) (App. A). But discrimination against a class of people because there are less of them sets a dangerous precedent. For example, the Appellate Court's analysis would allow the State to refund property taxes and exclude Lesser Residents and Non-Residents who own Colorado property from a property tax refund because they "pay less" in the aggregate than the more numerous Preferred Residents.

Finally, review should be granted to provide guidance to states and municipalities that have implemented or are considering implementation of tax refund, tax rate deduction, or tax holiday legislation that affect different classes of residents and citizens of other states. *E.g.*, *see also*, HAW. CONST. art. VII, § 6; ORE. CONST. art. IX, § 14; O.R.S. § 291.349(6); MO. CONST. ART. X, § 18; CAL. CONST. art. XIII B § 2 (1979, amended 1988, 1990); and Cal. Gov. Code § 7911 (2005). Colorado, while a national leader in limiting the growth of government through TABOR, is not a model state to be followed concerning tax refunds. Given the nationwide impact and strong appeal of TABOR-style revenue controls, citizens of Colorado and many other states look to this Court to review the constitutionality of unequal tax refund statutes. (*See also*, App. F and G).

Accordingly, Petitioners request that this Court act to guard their rights under the Privileges and Immunities Clause, the Commerce Clause, the Right to Travel, and the Equal Protection Clause.

A. Under Settled Precedents Of This Court, A Sales Tax Refund Statute Which Facially Discriminates Against Certain Residents And Non-Residents Violates The Privileges And Immunities Clause

The Privileges and Immunities Clause, U.S. CONST., art. IV, § 2, mandates that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," (collectively, "P&I Clause"). The compelling purpose of the P&I Clause is to "strongly . . . constitute the citizens of the United States as one people," by "plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia,* 75 U.S. 168, 180 (1868), *ovrl'd in part on other grounds* by *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). One right thereby secured is the right of a citizen of any State to "remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to." *Lunding v. N.Y. Tax Appeals Tribunal,* 522 U.S. 287, 296 (1998), *citing Shaffer* v. *Carter,* 252 U.S. 37 (1920). *See also, Toomer v. Witsell,* 334 U.S. 385, 396 (1948) and *Ward v. Maryland,* 79 U.S. 418 (1871) (Among the privileges and immunities accorded each citizen is protection from "higher taxes or excises than are imposed by the State upon its own citizens." *Id.* at 430.).

Under this Court's decisions in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), and *Austin v. New Hampshire*, 420 U.S. 656 (1975), the P&I Clause prohibits any state from creating a special tax burden against non-residents or a special tax benefit for residents. A State may not grant a tax exemption only to Preferred Residents, while outright prohibiting Non-Residents the same exemption. *Travis* and *Austin* stand for the rule that a "tax classification must fall if it has the effect of retaliating against citizens of other states who have no representation in the taxing state's legislative halls." *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386, 388 (S.C. 1984). Yet, this is exactly what Colorado's Sales Tax Refund Statute does. This Court thus recognized that "'[s]omething more is required than bald assertion' ... to establish the validity of a taxing statute that on its face discriminates against nonresidents." *Austin*, 420 U.S. at 666, n. 10, *citing in part Mullaney v. Anderson*, 342 U.S. 415, 418 (1952). The Court of Appeals utterly failed to follow precedent analyzing these issues.

The Sales Tax Refund Statute undeniably discriminates "on its face." The Colorado statute actually compels the discrimination at issue. The Court of Appeals opined that although the Sales Tax Refund Statute discriminates on its face, such discrimination is acceptable because the General Assembly had no intent to discriminate. *Thorpe*, 107 P.3d at 1069. However, the Court of Appeal's analysis and conclusion were woefully off track. Lack of intent to discriminate is not the determinative factor. This Court requires "something more." *Austin*, 420 U.S at 666. When a statute discriminates "on its face" and implicates a fundamental right, the burden of proof shifts to the State.

Colorado must prove a substantial reason for discrimination, prove that Lesser Residents and Non-Residents are a "particular source of evil," and prove that the legislature intended to correct the identified evil with the discriminatory statute. *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *The Supreme Court, 1977 Term,* 92 Harv.L.Rev. 75, 84 (1978) ("*Hicklin* places a duty [or burden] on the state to demonstrate a relationship between the presence of nonresidents and the problem which the state purports to alleviate. The shift of the burden of proof in this first prong discards the presumption of constitutionality that a statute normally enjoys. . . ." *Id.* at 84.). The State did not prove any of these constitutional requirements, especially that Non-Residents are a "particular source of evil. . . ." and the Court of Appeals ignored the burden-shifting standard. Incredibly, the Court of Appeals defined the particular "evil" as the $2.3 billion dollars excess tax revenues generated, in part, by Non-Residents and defined the appropriate "cure" as the Sales Tax Refund. *Thorpe,* 107 P.3d at 1069. To legitimize the discrimination, the Court of Appeals turned on its head this Court's precedent analyzing and defining a "particular source of evil."

Cementing the constitutional infirmity is that alternative, non-discriminatory tax refund methods were available which cost less and were more efficient than the Sales Tax Refund. Some less costly and non-discriminatory methods expressly set forth in TABOR involve across-the-board tax-rate reductions, tax credits, or tax holidays. The Court of Appeals failed to address these alternatives.

Apart from having ignored the burden of proof on the State, the Court of Appeals also applied the wrong standard

of review. The Court of Appeals analyzed the Statute only in terms of whether it was reasonable and justified, and never sought to analyze the discrimination under this Court's two-pronged Substantial Basis Standard:

> When confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."

Lunding, 522 U.S. at 287, *citing Supreme Court of New Hampshire v. Potter*, 470 U.S. 274, 284 (1985).

Both prongs of analysis must be met, and the Court of Appeals did not properly apply either one.

B. Under Settled Precedents Of This Court, A Sales Tax Refund Statute Which Facially Discriminates Against Certain Residents And Non-Residents Violates The Commerce Clause

Colorado's Court of Appeals determined that the Sales Tax Refund Statute created a burden on interstate commerce, but that the burden was "incidental" or "small" in comparison to the "local benefit" — which it defined as "a timely and reasonable refund in compliance with TABOR." *Thorpe,* 107 P.3d at 1073. While Petitioners disagree with this characterization, it is irrelevant for purposes of constitutional analysis. As this Court has repeatedly instructed, "there is no '*de minimis*' defense to a charge of discriminatory taxation

under the Commerce Clause." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 582 (1997), *citing Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 334, n.3, (1996); *see, Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) ("Actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred."); *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981); *see also, Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 334, n.13 (1977). Actual discrimination was found here.

The Court of Appeal's holding is clearly incorrect because a court shall not weigh how burdensome the effect is on commerce in relation to a local benefit — only that there is a burden on interstate commerce. *See, Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342 (1992) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry" (*citations omitted*); *Camps Newfound*, 520 U.S. at 575 (a statute discriminating on its face against interstate commerce is virtually *per se* invalid).

The burden is clearly not "incidental" or a "small burden . . . in relation to the local benefit." This is so because of the substantial number of citizens and significant economic commerce affected. An example in relation to one person is illustrative. In 2000, a Preferred Resident who had more than $126,000.00 in income, received a sales tax refund of $524.00. That $524.00 equates to an exemption of State sales tax on $19,793.10 of purchases. *See,* App. G. The Lesser Resident and Non-Resident, both excluded from the Sales Tax Refund, must pay taxes on their first $19,793.10 of purchases in the State. Colorado has imposed a higher

effective tax rate for Non-Residents and Lesser Residents. The "incidental" burden at stake involves potentially greater than $100 million dollars.

Because the Sales Tax Refund Statute is facially discriminatory, the correct constitutional standard of review is strict scrutiny. *Camps Newfound,* 520 U.S. at 582. The burden of defending facial discrimination is "so heavy that 'facial discrimination by itself may be a fatal defect.'" *Id., citing Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality of Or.*, 511 U.S. 93, 101 (1994) (*citations omitted*). The Court of Appeals failed to apply the standard of review mandated by this Court.

Since the Sales Tax Refund Statute discriminates "on its face," it is "virtually *per se* invalid." *Camps Newfound,* 520 U.S. at 575. As discussed, *supra*, nearly 210,000 taxpaying Lesser Residents annually are prohibited from receiving a Sales Tax Refund in any given refund year because they were not full-year residents, which means they had to travel across the State's borders. There are nearly 78,000 Non-Residents annually whose jobs, but not residences, are in Colorado and who work daily in Colorado, paying substantial income taxes, sales taxes, and/or all other applicable taxes to Colorado. Additionally, there are millions of Non-Residents who visit or live in Colorado temporarily, including approximately 15,000 non-resident college students and 25,000 non-resident military personnel annually.

Each of theses groups is comprised of citizens who pay all applicable sales taxes, income taxes, property taxes, and taxes of every sort and kind. These citizens substantially contribute to the economic base and commerce in Colorado, by their employment and/or purchases of goods and services,

yet are denied participation in the Sales Tax Refund purely because they reside in or come to reside from another state. Non-Residents in particular travel to Colorado to participate in economic activities such as shopping, housing, dining, and/or entertainment, and pay substantial sales taxes to Colorado on their transactions totaling 10% of Colorado's total sales and use tax base ($300 million). These Non-Residents are thus discriminated against because they pay a higher effective tax rate for no reason other than their status as citizens of another state.

There were many non-discriminatory and less restrictive ways to achieve the goal of reducing and distributing the TABOR surplus. Examples of such non-discriminatory ways would be across-the-board sales tax rate reductions and sales tax holidays. Yet Colorado chose not to implement non-discriminatory, less restrictive ways to reduce the surplus. The Court of Appeals did not address these permissible options, even though some of them are expressly set forth in TABOR. Under the Commerce Clause, the State must first look to non-discriminatory ways to achieve its goal. *See, e.g., W. Lynn Creamery v. Healy*, 512 U.S. 186 (1994); *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Oregon Waste*, 511 U.S. 93, *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); 1 J. HELLERSTEIN & W. HELLERSTEIN, STATE TAXATION §4.13 [1A] (3d ed. Supp. 2000). This Court should grant the Petition because the Colorado Courts failed to apply the proper analysis concerning the Commerce Clause to the Sales Tax Refund Statute.

C. Under Settled Precedents Of This Court, A Sales Tax Refund Statute Which Facially Discriminates Against Certain Residents and Non-Residents Violates The Right To Travel

"[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz,* 526 U.S. *at 498.* The Right to Travel is recognized as a fundamental right. *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969), *ovrl'd in part on other grounds* by *Edelman v. Jordan,* 415 U.S. 651 (1974). It is a fundamental right "so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Saenz,* 526 U.S. at 498. This Court has said that "[t]he right of 'free ingress and regress to and from' neighboring States, which was expressly mentioned in the text of the Articles of Confederation [note omitted], may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" *Saenz,* 526 U.S. at 501. In furtherance of a stronger Union,

> [t]he "right to travel" . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz, 526 U.S. at 500. Colorado's Sales Tax Refund Statute violates at least two of these constitutional principles.

Lesser Residents and Non-Residents are not treated as "welcome visitors" or "for those travelers who elect[ed] to become permanent residents ... like other citizens of that State." Since, by definition, Lesser Residents were either in a state of "ingress or regress to and from neighboring States," the Right to Travel free of penalty or burden was violated. *Shapiro,* 394 U.S at 638; *Saenz,* 526 U.S. at 490-99; *Dunn v. Blumstein,* 405 U.S. 330 (1972); and *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974). Strict scrutiny applies to such violations. *Id.* Because the Court of Appeals found no penalty or burden on Plaintiff's Right to Travel, it simply declined to review the Trial Courts' application of the rational basis standard of review. *Thorpe,* 107 P.3d at 1071.

The Court of Appeals did opine, in its Commerce Clause analysis, that Petitioners have established an "incidental" or "small" burden. *Thorpe,* 107 P.3d at 1073. Importantly, a "small" or an "incidental" burden is all that is required to establish a violation of both the Right to Travel and the Commerce Clause, when a statute like the Sales Tax Refund Statute discriminates on its face.

The Court of Appeals further opined that "plaintiffs make no specific allegations as to how the mere possibility of a future refund hindered the right to travel." *Thorpe,* 107 P.3d at 1070. The Court of Appeals' analysis misses the mark. The issue does not concern the mere possibility of a future refund. Rather, the issue concerns whether the Petitioners were "penalized" or "burdened" in connection with their constitutionally-protected Right to Travel. Petitioners were "penalized" or "burdened" because the Sales Tax Refunds actually went to other taxpayers. These substantial refunds have the effect of lowering the effective sales tax rate of

"Preferred Residents" and increasing the effective sales tax rates of Lesser Residents and Non-Residents. Preferred Residents essentially have a large sales tax exemption on their first several thousand dollars in purchases of goods and services that Lesser Residents and Non-Residents do not have. (*See*, App. G). The Court of Appeals failed to recognize this burden or penalty.

The Court of Appeals also opined that the Sales Tax Refund Statute did not establish a permanent denial of benefits. Again, such analysis missed the mark. The issue is not whether there is a permanent denial of benefits, although there clearly is a permanent denial of benefits to Lesser Residents who became residents of other states and to Non-Residents. Rather, the issue is whether Lesser Residents and Non-Residents have been penalized or burdened. It is undeniable that they have been burdened. As soon as a taxpaying Colorado resident crosses the Colorado border to become a resident of another State, that person is penalized. That person is immediately ineligible to participate in the Sales Tax Refund, although the person paid sales tax and will be required in almost every instance to file a Colorado income tax return and pay Colorado income taxes.

In *Crandall v. Nevada*, 73 U.S. 35 (1868) this Court struck down a Nevada statute taxing persons leaving the State. In essence, this is what Colorado does because it imposes an effectively higher tax rate on Lesser Residents leaving or entering the State. If a resident citizen is good enough to be a "resident" for purposes of being required to pay taxes, as in Colorado, that citizen should also be a good enough "resident" for eligibility to receive a refund, especially since they are still required to pay Colorado income taxes after they leave Colorado. The Court of Appeals ignored this substantial issue.

D. Under Settled Precedents Of This Court, A Sales Tax Refund Statute Which Facially Discriminates Against Certain Residents And Non-Residents Violates The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, § 1, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." The Court of Appeals misanalysed the Equal Protection Clause claim under the rational basis standard because that Court said that a fundamental right or a suspect class was not established. *Thorpe,* 107 P.3d at 1071.

However, a fundamental Right to Travel across State lines free of penalty or burden exists. The State should have been required to establish that its facially-discriminatory statute was necessary to promote a compelling governmental interest. In *Shapiro*, this Court unequivocally "held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause 'unless shown to be necessary to promote a *compelling* governmental interest,' [*cite omitted*] and that no such showing had been made." *Saenz,* 526 U.S. at 499, *citing Shapiro,* 526 U.S at 634. The same is true here. "In any event, if the statutory scheme cannot pass even the minimal test proposed by the State, we need not decide whether any enhanced scrutiny is called for." *Zobel v. Williams*, 457 U.S. 55, 60-61 (1982).

The State's statutory scheme does not meet the minimal test, much less enhanced scrutiny. The Court of Appeals said that "[i]n crafting the refund mandated by TABOR, the General Assembly sought to address this legitimate state interest by refunding the surplus to those persons who had contributed most substantially to the surplus." *Thorpe,* 107 P.3d at 1072. This statement does not pass "constitutional muster" even under a minimal test for at least five reasons.

First, this statement does not speak to a legitimate governmental purpose. *See Shapiro,* 526 U.S at 632. In *Shapiro,* this Court prohibited a state from making parochial classifications between new residents and old residents because such "reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according the past tax contributions of citizens. The Equal Protection Clause prohibits such an apportionment of state services." *Id.* at 632-33. The same is true here. If Colorado can set up classifications of "residents" based on the length of their residency in a calendar year, then it could further enact statutes that apportioned state services or benefits (e.g., preferred schools, parks, libraries, etc.) only to Preferred Residents while denying the same services or benefits to Lesser Residents.

Second, Petitioners have established a fundamental right, yet the State arbitrarily excludes Non-Residents and Lesser Residents. There is no way to tell who contributed the most to the surplus. Many Lesser Residents could have earned millions of dollars in high-tech industries or other gainful employment and made substantial purchases subject to sales tax, yet are statutorily ineligible to receive a refund.

A thirty-year, small-business owner Coloradoan could retire and move to Arizona, and that 30-year Colorado resident would then as a Lesser Resident be ineligible to receive a refund, although he or she could have contributed substantially to taxes, be they sales, income and/or capital gain taxes, in the year of moving across the State line. Colorado's decision to base the refund on income tax tiers is particularly unfair where Lesser Residents and Non-Residents overall may have more income and more taxable purchases than a Preferred Resident, but are still excluded from the Sales Tax Refund.

Third, TABOR expressly provides that tax-rate reductions and tax credits are appropriate, non-discriminatory ways to reduce tax surpluses, especially when using sales taxes to reduce the surplus. COLO. CONST. art. X § 20 ("Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions."). Colorado chose not to implement these less costly, more efficient, non-discriminatory alternatives expressly authorized by TABOR. The Court of Appeals chose not to address any alternatives.

Fourth, Colorado's use of residency is wholly arbitrary. Residency can be established immediately by an individual's move into the State with the intent to be a resident, or statutorily by being domiciled in the State for six months plus one day. C.R.S. §§ 39-22-103 (8), 109(1), and 601(1)(a). In both cases, these taxpayers are good enough residents to be taxed, but not good enough residents to receive the Sales Tax Refund.

Fifth, refunding to a class of only full-calendar-year residents because they have contributed the most is wholly specious. There is virtually no tax category where full-

calendar-year residents – being the majority of residents — would not always contribute more than any other class of residents. This reasoning would permit discrimination against Lesser Residents and bans on Non-Residents from almost any tax refund plan devised by the legislature, contrary to all constitutional principals.

Here there is no question that those citizens who moved to Colorado, and became newly-arrived Lesser Residents, were statutorily ineligible for a tax refund — although not statutorily ineligible to pay taxes — and thus fall in a classification that "touches on the fundamental right of interstate movement." This classification had the "effect of imposing a penalty on the exercise of the right to travel" and created second-class citizens — people required to pay taxes yet totally ineligible to receive tax refunds.

There is also no question that those Lesser Residents who moved out of Colorado fall in another inequitable classification that "touches on the fundamental right of interstate movement," and this classification had the "effect of imposing a penalty on the exercise of the right to travel." Millions of Non-Residents who travel to work in or visit Colorado make substantial purchases in Colorado throughout the year, and pay substantial income and/or sales taxes to the State, fall in a classification that "touches on the fundamental right of interstate movement." This classification had the "effect of imposing a penalty on the exercise of the right to travel." As with the other three constitutional provisions discussed, the Equal Protection Clause has been violated.[4]

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[4] *See also, Zobel,* 457 U.S. 55*; Metropolitan Life Ins. Co. v. Ward,* 470 U.S 869 (1985)*; Williams v. Vermont,* 472 U.S. 14 (1985); *and Plyler v. Doe,* 457 U.S. 202 (1982).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE COLORADO COURT OF APPEALS DATED OCTOBER 21, 2004

COLORADO COURT OF APPEALS

Court of Appeals No.: 03CA0243
City and County of Denver District Court No. 99CV2974
Honorable Lawrence A. Manzanares, Judge

John K. Thorpe, Elisha E. Sprong, Darrell J. Vigil, Sean P. Ley, and Hector Juarez, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

State of Colorado and Fred Fisher in his official capacity as Executive Director of the Colorado Department of Revenue and Tax Collector for the State of Colorado,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division V
Opinion by: JUDGE NIETO
Webb and Russel, JJ., concur

In this action challenging the constitutionality of limiting certain tax refunds to full-year Colorado residents, plaintiffs, John K. Thorpe, Elisha E. Sprong, Darrell J. Vigil, Sean P. Ley, and Hector Juarez, appeal the judgment entered in favor of defendants, the State of Colorado and Fred Fisher in his

official capacity as Executive Director of the Colorado Department of Revenue and Tax Collector for the State of Colorado (collectively the State). We affirm.

In fiscal year 1996-97 and thereafter, the State collected excess revenue that it was required to refund under the Taxpayer's Bill of Rights (TABOR), article X, § 20 of the Colorado Constitution. The excess revenue arose from a general fund surplus of all taxes, fees, and other nonexempt revenues collected by the State.

To comply with TABOR and to avoid federal income tax implications for recipients, the General Assembly decided to refund a portion of the sales tax collected to full-year residents. It enacted §§ 39-22-120 and 39-22-2001 to 39-22-2003, C.R.S.2004 (collectively refund statutes), to accomplish these objectives.

Recognizing the wide variety of sources of revenue and the impossibility of identifying or returning particular payments, the General Assembly concluded that proportional refunds were not feasible. Sections 39-22-120(1)(i)(I)-(II), 39-22-2001(1)(i)(I)-(II), C.R.S.2004. It also determined that "more Coloradans pay state sales tax than any other state tax," and therefore, to refund the excess revenue as a state sales tax refund was both reasonable and fair. Sections 39-22-120(1)(i)(III), 39-22-2001(1)(i)(III), C.R.S.2004. The General Assembly limited the sales tax refund, as relevant here, to those individuals who had been domiciled in this state for the entire taxable year. Sections 39-22-120(2)(a), (3), 39-22-2003(1)(a), (2), C.R.S.2004.

Appendix A

The legislative declarations in §§ 39-22-120(1) and 39-22-2001 make clear that the purpose of the refund statutes is to refund revenue collected by the State in excess of the amounts authorized by TABOR. The statutes look backward in that the necessity for a refund cannot be known until after all the revenue for a particular tax year has been collected. Thus, they have no effect on taxpayers during the tax year in which the taxes, fees, and other nonexempt revenues are assessed and collected.

TABOR generally does not place limits on the amount that can be generated from particular taxes or sources of government revenue. Rather, it limits the amount the State can spend in a fiscal year and mandates refunds in the next fiscal year if total revenue exceeds the TABOR limits. However, "Refunds need not be proportional when prior payments are impractical to identify or return." Colo. Const. art. X, § 20(1). Thus, when proportionate refunds are not practical, the purposes of TABOR can be accomplished by refunding a particular tax even though the excess revenue comes from a variety of sources.

Here, it was undisputed that the revenues collected by the State were from many sources, including income and sales taxes, taxes on specific items, service and inspection fees, license and permit fees, rents, and interest and investment income. Although plaintiffs, who were not full-year residents, had paid sales and income taxes, it was also undisputed that the State could not identify and return a proportional amount to every person who paid a particular tax or fee.

Appendix A

Plaintiffs commenced this class action on behalf of nonresidents and part-year residents challenging the constitutionality of the refund statutes for the 1997, 1998, and 1999 income tax years. Plaintiffs and the State filed motions for summary judgment in which both parties asserted the absence of disputed issues of fact. Before ruling on class certification, the trial court granted summary judgment in favor of the State. This appeal followed.

I.

Plaintiffs assert on appeal that the trial court improperly decided disputed material issues of fact. We disagree.

Appellate review of summary judgment is de novo. Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *De La Rosa v. W. Funding, Inc.*, 24 P.3d 637 (Colo. App. 2001).

However, plaintiffs fail to state what material facts the trial court decided. Accordingly, we decline to address this issue because it was only perfunctorily presented in plaintiffs' brief. *See People v. Diefenderfer*, 784 P.2d 741, 752 (Colo. 1989) ("It is the duty of counsel for appealing parties to inform a reviewing court both as to the specific errors relied upon and as to the grounds, supporting facts and authorities therefor."). Moreover, our review of the record reveals that the facts relevant to this appeal are not in dispute.

Appendix A

II.

Plaintiffs contend the refund statutes violate their rights under the Privileges and Immunities Clause of article IV, § 2, of the United States Constitution, particularly their right to travel interstate. We disagree.

Statutes are presumed constitutional. The party asserting that a statute is unconstitutional has the burden of establishing unconstitutionality beyond a reasonable doubt. *Anderson v. Colo. State Dep't of Pers.*, 756 P.2d 969, 975 (Colo. 1988). Where a statute is susceptible of a constitutional as well as an unconstitutional construction, the legislature will be presumed to have intended the constitutional construction. *State v. Colo. Civil Rights Comm'n*, 185 Colo. 42, 521 P.2d 908 (1974).

Article IV, § 2 of the Constitution states, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." Specifically, the Privileges and Immunities Clause protects the right of a citizen of one state to enter and leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state. *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).

A.

The Privileges and Immunities Clause bars discrimination against citizens of other states absent

substantial reason for the discrimination beyond the mere fact that they are citizens of other states. *Saenz v. Roe, supra.* However, a state need not always apply all its laws or extend all its services equally to anyone, resident or nonresident, who may request that it do so. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

Like many other constitutional provisions, the Privileges and Immunities Clause is not absolute. It does not preclude disparate treatment in the many situations where valid reasons exist for such treatment, independent of residency in the forum state. Thus, the inquiry in each case must be whether such reasons exist and whether the degree of discrimination bears a close relation to them.

Distinctions between residents and nonresidents are permissible if they merely reflect the fact that this is a nation composed of individual states. Other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single union of the states. *Lunding v. New York Tax Appeals Tribunal,* 522 U.S. 287, 118 S.Ct. 766, 139 L.Ed.2d 717 (1998). Thus, a state must treat all citizens, resident and nonresident, equally only with respect to those "privileges" and "immunities" bearing upon the viability of the nation as a single entity. *Baldwin v. Fish & Game Comm'n, supra.*

The Supreme Court has not undertaken to define specifically the nature or the extent of these privileges and immunities. *Saenz v. Roe, supra* (Rehnquist, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 166, 88 S.Ct. 1444, 1456,

20 L.Ed.2d 491 (1968) (privileges and immunities "are not and cannot be fully defined in their entire extent and precise nature"). However, the Constitution does not preclude states from adopting "justified and reasonable distinctions between residents and nonresidents in the provision of tax benefits, whether in the form of tax deductions or tax credits." *Lunding v. New York Tax Appeals Tribunal, supra,* 522 U.S. at 311, 118 S.Ct. at 780.

The inquiry into permissible distinction must be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures. *Toomer v. Witsell,* 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

Here, the refund statutes address the "local evil" of excess revenues and prescribe the "appropriate cure" of a refund. The question thus is whether the distinctions between residents and nonresidents in the refund statutes are justified and reasonable. *See Lunding v. New York Tax Appeals Tribunal, supra.* For the following reasons, we conclude they are.

The purpose of the refund statutes is to comply with TABOR. A statute that complies with the state constitution does not necessarily comply with federal constitutional requirements, but plaintiffs do not contend that TABOR has any constitutional defects. Therefore, in the context of this appeal, we will assume, without deciding, that the refund statutes' purpose is legitimate and constitutionally permissible.

Appendix A

Plaintiffs assert that the refund statutes have a discriminatory purpose on their face because they create unjustified distinctions between full-year residents on the one hand and part-year residents and nonresidents on the other. While the statutes make these distinctions, a review of the legislative declarations in §§ 39-22-120(1) and 39-22-2001 reveals a nondiscriminatory purpose. The distinctions between full-year residents and others resulted not from an intent to discriminate, but rather from an effort to prescribe a timely refund of excess revenues to the people who paid most of the money into the revenue fund. Given the wide variety of taxes, fees, and other nonexempt revenue sources that produce the excess revenue, most of which apply only to full-year residents, the General Assembly could reasonably conclude that full-year residents paid most of the money into the revenue fund.

The General Assembly designated the refund as a refund of sales taxes to avoid federal tax consequences to the recipients, not because the excess revenue was caused exclusively by sales taxes paid. Hence, the relevant inquiry was who paid the most taxes overall, not who paid the most sales tax. The General Assembly determined that full-year residents paid most of the taxes, and therefore, nonresidents and part-year residents are not similarly situated with full-year residents for purposes of the refund statutes. Thus, we conclude the distinctions were justified and reasonable.

Nevertheless, plaintiffs argue that by refunding the excess revenue as a sales tax refund, the refund statutes had the effect of lowering the sales tax rate for full-year residents as compared to part-year residents and nonresidents who also

paid sales tax. However, the legislative purpose was to refund excess revenue to the people who paid the most money into the revenue fund, and the use of a sales tax refund was merely a vehicle to accomplish this purpose. Any incidental discrimination in sales tax rates does not defeat the otherwise legitimate purpose of the refund statutes, because the choice of this method for making the required refund was justified and reasonable based on the following considerations: according to data considered by the General Assembly, full-year residents paid most of the money that created the excess revenue; more Coloradans pay sales tax than any other state tax; making a proportional refund of sales tax revenues was impossible; TABOR requires that refunds be made in the next fiscal year; and avoiding federal income tax consequences was an additional legitimate purpose.

Therefore, we conclude the distinctions in the refund statutes are not facially invalid under the Privileges and Immunities Clause.

B.

Turning to the constitutional right to travel, a brief review of some major cases illustrates the parameters of its protective reach. We conclude plaintiffs' claim does not come within that reach.

One line of these cases primarily concerns state action that directly affects interstate or intrastate travel. *United States v. Guest*, 383 U.S. 745, 757, 86 S.Ct. 1170, 1177-78, 16 L.Ed.2d 239 (1966) (indictment alleging conspiracy to injure and intimidate citizens in use of highways adequately

alleged conspiracy to violate a constitutional right, the right to travel); *Crandall v. Nevada*, 73 U.S. 35, 49, 18 L.Ed. 745 (1867) (invalidated law that taxed passengers transported for hire upon leaving Nevada). Other cases involve diminution of a basic necessity of life or an important right of citizenship based upon an individual's exercise of the right to travel. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269, 94 S.Ct. 1076, 1087-88, 39 L.Ed.2d 306 (1974) (invalidated durational residency requirement for receipt of medical care by indigents); *Dunn v. Blumstein*, 405 U.S. 330, 338-39, 92 S.Ct. 995, 1001-02, 31 L.Ed.2d 274 (1972) (invalidated one-year state residency requirement for exercise of right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S.Ct. 1322, 1328-29, 22 L.Ed.2d 600 (1969) (invalidated one-year state residency requirement for eligibility for welfare benefits), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Jeffrey v. Colo. State Dep't of Soc. Servs.*, 198 Colo. 265, 269, 599 P.2d 874, 877 (1979) (invalidated thirty-five-year continuous residency requirement for pension benefits); *see also Mayo v. Nat'l Farmers Union Prop. & Cas. Co.*, 833 P.2d 54 (Colo. 1992) (comprehensive review of right to travel authorities).

Further, when evaluating a right to travel claim, the Supreme Court has carefully distinguished between bona fide residency requirements and residency requirements that treat established residents differently based on the time they migrated into the state. *Attorney General v. Soto-Lopez*, 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986). Thus, the Court has consistently recognized that while new citizens must have the same opportunity to enjoy the privileges of

being a citizen of a state, the states may use bona fide residency requirements to ferret out those who intend to take the privileges from the state and leave. *Saenz v. Roe*, *supra* (Rehnquist, J., dissenting). "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents.... A bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents." *Martinez v. Bynum*, 461 U.S. 321, 328-29, 103 S.Ct. 1838, 1842-43, 75 L.Ed.2d 879 (1983).

Here, plaintiffs make no specific allegation as to how the mere possibility of a future refund hindered their right to travel. They do not allege they were denied basic necessities or that they fell within a class of financially insecure persons who lack access to state-provided resources. Nor do they assert the refund statutes affected an important right of citizenship. Rather, plaintiffs merely argue they were treated less favorably than full-year residents.

Disparate treatment, without an assertion that this treatment hinders the formation, the purpose, or the development of a single union, is insufficient to establish a claim under the Privileges and Immunities Clause. Under the refund statutes, plaintiffs may receive future refunds if they are domiciled in the state for one year. Hence, the refund statutes do not establish a permanent denial of benefits. And because the refund statutes operate only retrospectively and concern excess revenue from the prior tax year, the statutes impose no immediate penalty on a person who travels.

Therefore, plaintiffs have failed to meet their burden to establish that their right to travel is impaired.

Accordingly, we conclude that plaintiffs' rights under the Privileges and Immunities Clause were not hindered by the refund statutes.

Because we find no restriction on plaintiffs' right to travel, we need not determine whether the trial court applied the correct standard of review. *See In re Estate of Krotiuk*, 12 P.3d 302 (Colo. App. 2000) (an appellate court will uphold a decision by the trial court that has reached a correct result, albeit using different reasoning).

III.

Plaintiffs next contend the refund statutes violate the Equal Protection Clause, U.S. Const. amend XIV. They argue that the statutes violated their fundamental rights under the Privileges and Immunities Clause and their fundamental right to fair taxation. Therefore, they argue, the statutes must be subjected to strict scrutiny rather than the rational basis test. We disagree.

A.

We have already determined that the refund statutes did not violate plaintiffs' rights under the Privileges and Immunities Clause, and therefore, we reject that part of the argument. *See Zobel v. Williams*, 457 U.S. 55, 60 n.6, 102 S.Ct. 2309, 2313, 72 L.Ed.2d 672 (1982) ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis.").

Further, plaintiffs have cited no authority, and we are aware of none, holding that statutes creating classifications for tax purposes implicate fundamental rights.

Fundamental rights are those implicit in the concept of ordered liberty such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)). They are rights deeply rooted in this nation's history and tradition and must be explicitly or implicitly guaranteed by the United States Constitution. *Chavez v. Martinez*, 538 U.S. 760, 775, 123 S.Ct. 1994, 2005, 155 L.Ed.2d 984 (2003); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1973). The Supreme Court has been reluctant to recognize new rights as fundamental, and "[t]he development of fundamental rights in our jurisprudence has never been a matter for ad hoc determination." *Evans v. Romer*, 882 P.2d 1335, 1359 (Colo. 1994) (Erickson, J., dissenting), *aff'd*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). "It is not the province of [the Supreme] Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. Sch. Dist. v. Rodriguez*, *supra*, 411 U.S. at 33, 93 S.Ct. at 1297. Therefore, in the absence of compelling authority, we are not inclined to recognize a new fundamental right.

Moreover, such a holding would be incompatible with settled law granting legislatures broad authority in establishing classifications for purposes of taxation.

In taxation matters, "legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940). The Supreme Court has generally exercised a narrow review of tax classifications "to fit the broad discretion vested in the state legislatures." *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S.Ct. 1191, 1195, 43 L.Ed.2d 530 (1975). "The equal protection clause does not require the state to maintain a rigid rule of equal taxation...." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 284, 52 S.Ct. 556, 559, 76 L.Ed. 1102 (1932). Therefore, we reject plaintiffs' argument that for equal protection purposes, the refund statutes implicate a fundamental right.

B.

Because plaintiffs do not claim to be members of a suspect class and the refund statutes do not implicate a fundamental right, we will review the refund statutes under the rational basis test.

When a state classification does not involve a suspect class or a fundamental right, review under the Equal Protection Clause is limited to the rational basis test to determine whether the challenged statute is rationally related to a legitimate state interest. *Colo. Dep't of Soc. Servs. v. Bd. of County Comm'rs*, 697 P.2d 1, 13-14 (Colo. 1985).

Under the rational basis test, a statute does not violate equal protection guarantees if it is reasonable and bears a rational relationship to a legitimate state objective. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

> In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11, 112 S.Ct. 2326, 2332, 120 L.Ed.2d 1 (1992) (citations omitted). Even if a law appears unwise, works to the disadvantage of a particular group, or the rationale for the law seems tenuous, a reviewing court should not overturn the law on equal protection grounds. *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Further, a "classification need not be perfect," and a law is not invalid simply because it may result in some inequality. *Millis v. Bd. of County Comm'rs*, 626 P.2d 652, 658 (Colo. 1981).

Thus, possible differences in tax burdens not shown to be substantial or based on arbitrary and capricious discrimination, do not fall within constitutional prohibitions. *Friends of Chamber Music v. City & County of Denver*, 696 P.2d 309 (Colo. 1985).

Further, a tax is not an assessment of benefits. "It is . . . a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael v.*

S. Coal & Coke Co., 301 U.S. 495, 522, 57 S.Ct. 868, 878-79, 81 L.Ed. 1245 (1937).

Here, the legislature was mandated by the Colorado Constitution to refund the surplus tax revenue. In crafting the refund mandated by TABOR, the General Assembly sought to address this legitimate state interest by refunding the surplus to those persons who had contributed most substantially to the surplus. Therefore, as discussed above in part II, it had a rational basis for refunding excess revenue to full-year residents. Its choice of a sales tax refund as a means of avoiding federal tax implications for recipients of the refund also had a rational basis. Thus, we find no equal protection violation.

IV.

Plaintiffs next contend the refund statutes violate the Commerce Clause, U.S. Const. art. I, § 8(3). We disagree.

Although phrased merely as a grant of authority to Congress to regulate commerce among the several states, the Commerce Clause forbids the states from discriminating against interstate trade. More specifically, the clause prohibits economic protectionism, such as regulatory measures designed to benefit in-state economic interests by burdening out-of-state competition. *United Air Lines, Inc. v. City & County of Denver*, 973 P.2d 647 (Colo. App. 1998), *aff'd*, 992 P.2d 41 (Colo. 2000).

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and

> its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citation omitted); *see also Winkler v. Colo. Dep't of Health*, 193 Colo. 170, 564 P.2d 107 (1977).

Here, plaintiffs did not establish that the refund statutes have anything more than an incidental burden on interstate commerce. The statutes do not limit or restrict in any way plaintiffs' ability to access the markets in Colorado. Because plaintiffs could not have known whether there would be any refund when they did business in Colorado, and because the refunds that materialized were not in a significant amount for any individual recipient, we fail to perceive how the refund statutes could have impaired plaintiffs' access to interstate commerce. Further, any small burden imposed on plaintiffs is not clearly excessive in relation to the local benefit of a timely and reasonable refund in compliance with TABOR. Therefore, we discern no Commerce Clause violation.

The judgment is affirmed.

Judge WEBB and Judge RUSSEL concur.

APPENDIX B — ORDER OF THE DISTRICT COURT, COUNTY OF DENVER, COLORADO DATED DECEMBER 19, 2002

DISTRICT COURT, COUNTY OF DENVER, COLORADO
1437 BANNOCK STREET
DENVER, CO 80202

Case Number: 99CV2974

Courtroom: 5

PLAINTIFF(s):

JOHN K. THORPE, ET AL.,
INDIVIDUALLY, AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

DEFENDANT(s):

STATE OF COLORADO AND FRED FISHER,
IN HIS OFFICIAL CAPACITY.

ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT

This matter comes before the court upon the cross-motions for summary judgment filed by the parties. The issue presented is the constitutionality of C.R.S. 39-22-120, as enacted and as amended ("the Refund Statute"), pursuant to which the Colorado legislature refunded certain tax surpluses as required by the Taxpayer's Bill of Rights (the "TABOR Amendment"). The parties have stipulated to a bifurcated proceeding on the liability and class certification issues. Plaintiffs move to have the statute declared unconstitutional,

alleging violations of certain of their rights under the state and federal constitutions. Defendants move to have the Refund Statute declared constitutional, asserting that the statute does not impinge upon Plaintiffs' constitutional rights either in intent or effect. The parties agree to the absence of disputed material facts, thereby making the matter proper for resolution upon summary judgment. Both sides have extensively briefed their positions, supported by voluminous materials (many of which are identical), and which materials are not disputed in content, but only in application or interpretation.

BACKGROUND

The TABOR Amendment and the Refund Statute

The TABOR Amendment mandates the yearly return of excess state revenues ("surplus") as a means of limiting the annual growth of state fiscal year spending. (Colo. Const. Art. X, Section 20). Fiscal year spending is defined as comprising "all district expenditure and reserve increases," with certain exceptions as noted at Section (2) (e) of the TABOR Amendment. The maximum annual percentage change in state fiscal year spending is determined by a formula that ties inflation to population growth. (*Id* at Section (7) (a)) TABOR expressly provides that "its preferred interpretation shall reasonably restrain most the growth of government." TABOR also provides that "[s]ubject to judicial review, a district may use any reasonable method for refunds . . . including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return." TABOR has been described

as not only "limit[ing through means of voter approval,] the amount that the state spends, it also attempts to limit the amount that the state does not spend, but collects and keeps in reserve." (*See Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 12-13 (Colo. 1993).

For the fiscal years 1996-1997, 1997-1998 and 1998-1999, the State generated excess revenues that it was required to refund under the TABOR Amendment. To accomplish the refund, the legislature enacted the Refund Statute, which designates the refund as a sales tax refund. Persons qualified to receive the sales tax refund are identified at C.R.S. 39-22-120 (2) (a) (I-IV). Generally, in order to qualify for the refund, a person must have been either: (a) a full tax year domiciliary who filed a state tax return for either payment or refund; (b) a full tax year domiciliary 18 years or older; (c) a person who died during the tax year if that deceased person was in continuous residency from January 1, until the date of death, and whose estate or spouse is required to file a state tax return for either payment or refund; or (d) a person 18 years or older who died during the tax year if that deceased person was in continuous residency from January 1 until the date of death. The status of "home," "residency," and "domiciliary," which triggers the refund, is full calendar year residency, as manifested by in-state physical presence and/or "intent" to be a Colorado resident. Nonresidents and part-year residents are thus excluded from receiving a refund.

The excess revenue pool from which the refund is drawn is collected from a wide variety of fees and taxes, including sales tax and income tax. The excess revenue refund is

administered and distributed through the state income tax system. The amount of any given individual's sales tax refund is determined by the amount of state income taxes paid. Because the Plaintiffs are non-residents or only part-time residents, they do not qualify for the challenged refund.

Plaintiffs and Their Claims

Plaintiffs are members of a proposed class which includes (a) "all persons who have been subjected to levy, collection and payment of the State of Colorado's sales tax used to issue refunds, and who have not been refunded a portion of the tax because they did not meet the domicile, durational or other eligibility requirements of the sales tax refund statute," and also includes, (b) "all persons who were or are required to file and pay Colorado state income taxes and who were ineligible to receive a sales tax refund because they did not meet the domicile, durational or other eligibility requirements of the sales tax refund statute." (Third Amended Complaint at paragraph 12). The named Plaintiffs of the proposed class include recreational visitors to Colorado such as Plaintiffs Thorpe and Sprong who are Wyoming residents; workers such as Plaintiffs Juarez and Levy who are Wyoming residents but who pay Colorado taxes on income earned in Colorado, and part time residents of Colorado such as Plaintiff Vigil. Plaintiffs also point out in their brief that other non-qualified persons/entities would include, e.g., corporations, Colorado residents who are incarcerated for part of the tax year, members of the military who live in Colorado during their tour of duty but are domiciled in another state, non resident college students, and wage earners under the age of 18 years who do not file income tax returns.

Appendix B

Plaintiffs contend that the State may not permissibly limit the refund of its surplus to its own citizens. More particularly, they contend that limiting refunds to full year residents (a) violates the privileges and immunities clause of the United States Constitution, (b) violates the equal protection clause of the United States Constitution, (c) violates their constitutionally protected right to travel, and (d) violates the commerce clause of the United States Constitution.

LEGAL ANALYSIS

Plaintiffs' Claim of Violation of the Privileges and Immunities Clause of the U.S. Constitution

The Substantial Relation Test

The modern understanding of the privileges and immunities clause was announced in *Toomer v. Witsell*, 334 U.S. 385 (1948), which enunciated the "substantial relation" test. Disparate treatment of residents and non-residents is not precluded where there are valid independent reasons for it, but discrimination against citizens of other states is barred where there is "no substantial reason for the discrimination beyond the mere fact that they are citizens of other states." *Id* at 396. The *Toomer* case also recognizes the principle that states are afforded "considerable leeway in analyzing local evils and in prescribing appropriate cures." Id. Plaintiffs argue that to meet this standard, the State must show that nonresidents "constitute a peculiar source of evil at which the [discriminatory] statute is aimed," citing *Toomer v. Witsell*, id at 398, and *Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978). However, the circumstances of this case do not neatly

lend themselves to a "peculiar source of evil" analysis. Assuming for the moment the truth of the State's asserted rationale for the Refund Statute (as discussed below), the State attempts to distinguish between those who paid more taxes and fees and those who paid less by using a length of residency requirement. Therefore, the State's putative goal is not to eradicate some peculiar source of evil, but to identify those who paid the most in taxes and fees. Whether the State is actually seeking to discriminate on the basis of amount of taxes and fees paid, rather than citizenship, is discussed below.

Analysis of State's Justifications

Plaintiffs argue that the right to be treated equally in matters of taxation is a fundamental right, that the Refund Statute results in a higher effective tax rate on non-residents, and that there is no valid purpose for the discrimination other than to favor full year residents. The State, on the other hand, argues that there are legitimate nondiscriminatory purposes for the statutory distinctions. The State's justifications therefore require scrutiny.

In scrutinizing the State's justifications, the court recognizes that states have considerable leeway in aligning the tax burden of nonresidents to instate activities, so long as nonresidents are not denied tax benefits without a substantial justification. *Lunding v. N. Y. Tax Appeals Tribunal*, 522 U.S. 287, 302 (1998). States may adopt reasonable distinctions between residents and nonresidents in the provision of tax benefits. *Id* at 311.

Appendix B

The State's first justification for the structure of the Refund Statute is the legitimate interest in making the refund non-taxable under federal income tax laws. (Def. Supp. Response and Documents, p.12.) It was for this reason that the refund was designated as a sales tax refund. Making the refund non-taxable to recipients under federal law is certainly a proper purpose and justifies designating the refund as a sales tax refund. It is not as readily apparent why designating the refund as a sales tax refund justifies distinguishing between full year residents and others.

The State argues that the goal of the General Assembly was to return the surplus to persons whose payment of taxes and fees most likely created the surplus. In their supplemental brief, plaintiffs focus on the fact that the Refund Statute does a poor job of distinguishing between those who paid the most in sales tax and those who paid the least. However, inasmuch as the surplus is a product of all taxes and fees, and not just sales tax, the issue is not who paid the most sales tax, but who paid the most taxes and fees overall. The State argues that it is impossible to identify exactly who paid the wide variety of taxes and fees that contributed to the surplus, and therefore it is reasonable to use a length of residency requirement to ensure that those who contributed little or nothing to the surplus do not receive an unwarranted windfall.[1] This rationale rests on the assumption made by

1. The State has argued in some places that the length of residency requirement is derived from the inability to precisely identify those who paid the most *sales tax.* (*See, e.g.*, Defendants Supp. Response and Documents, p. 17.) In other places they argue the length of residency requirement is derived from the inability to

(Cont'd)

the State that there is a correlation between length of residency and the amount of taxes and fees paid, and that non-residents and part year residents pay proportionately less than their share of the actual cost of state services.

Plaintiffs are highly critical of the state's reliance on that assumption. They argue that there is no evidence demonstrating a correlation between length of residency and amount of taxes paid, or that part year residents and nonresidents pay less than their share of the cost of state services. Plaintiffs point out that in *Austin v. New Hampshire*, the Supreme Court noted that where a facially discriminatory tax scheme is involved, "something more is required than bald assertion" to support the State's justifications. 420 U.S. at 666, n.10 (citing *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952)).

Regarding the issue of whether such a correlation actually exists, the court finds that as a general proposition it is self evident that residents generally pay more taxes and fees than nonresidents, and full year residents generally pay more than part year residents. There are certainly many exceptions. A part year resident with a very high income may pay more taxes than a low-income full year resident. Similarly, a highly paid nonresident who works in Colorado but resides in a neighboring state may pay more than a low-income resident

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(Cont'd)

precisely identify those who paid *all taxes and fees*. (*See, e.g.*, Motion of [sic] Summary Judgment or in the Alternative Motion to Dismiss, pp. 9, 25-26.) If the General assembly's goal was to refund sales tax to those who contributed most to the surplus, the latter issue is the relevant one.

of Colorado. But the fact that the correlation is only generally true, rather than true for every individual, does not make it untrue or irrational. That the correlation between length of residency and amount of taxes paid is imperfect does not make it a constitutionally impermissible rationale. Legislatures are granted broad discretion in determining how to accomplish permissible goals, and the fact that there may be a better way does not render the chosen method infirm.

While logic alone is enough to support the existence of the correlation between length of residency and amount of taxes paid, the legislative history shows that the General Assembly had access to a voluminous amount of information on who paid taxes and in what amounts, and that it considered many factors and many options before agreeing on the method of implementing a refund. It considered the cost of various options, the administrative burdens, the number of taxpayers affected, the source of the surplus, the timing of the refund, the ability to identify certain classes of taxpayers, and the potential tax consequences of various options. Examples of the type of information available to and considered by the General Assembly are set out in Appendix A. Given the volume of information considered by the General Assembly, the court is unable to find that the asserted correlation between length of residency and amount of taxes paid is unsupported by the evidence.

Somewhat more troubling is plaintiffs' assertion that even if there is in fact a correlation between length of residency and the amount of taxes and fees paid, the General Assembly did not base the discriminatory features of the Refund Statute on the premise that such a correlation existed.

Appendix B

In essence, plaintiffs ask this court to find that the State's justification for the Refund Statute is a disingenuous *post hoc* rationalization. Given that the position now argued by the State does not appear to have been clearly enunciated by the General Assembly, plaintiff's argument is somewhat appealing. Despite the temptation to agree with plaintiffs and find that the General Assembly's true rationale was simply to prefer Colorado residents over nonresidents, the invitation to question the General Assembly's motives must be tempered by established rules of statutory construction. Where a statute is susceptible to a constitutional as well as an unconstitutional construction, the legislature will be presumed to have intended the constitutional construction. *State Dept. of Inst. v. Colorado Civil Rights Comm'n*, 521 P.2d 908, 910 (1974). Courts must construe a statute to be constitutional if possible. City *and County of Denver v. Board* of *Assessment Appeals*, 30 P.3d 177, 180 (Colo. 2001). In reviewing actions of the General Assembly, the court presumes that a statute comports with constitutional standards. *People v. McCullough*, 6 P.3d 774, 779 (Colo. 2000). A party challenging the constitutionality of a statute bears the burden of proving unconstitutionality beyond a reasonable doubt. *People v. Longoria*, 862 P.2d 266, 270 (Colo. 1993). These rules of construction require a court to give the General Assembly the benefit of the doubt and do not permit a court to reject a constitutionally permissible rationale simply because it was not expressly articulated by the General Assembly. The General Assembly had all of the information it needed to rationally reach the conclusion now argued by the State as justification for the Refund Statute, and this court is unable to find beyond a reasonable doubt that the General Assembly's motives were not consistent with that asserted justification.

Appendix B

The Refund Statute Does Not Create an Unreasonable Burden on Nonresidents

"When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing *unreasonable* burdens on citizens of other States" in their pursuit of various actions. *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978) (emphasis added). It is "only with respect with those `Privileges' and `Immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* The cases cited by Plaintiffs in support of this portion of their summary judgment argument involve, without exception, substantial burdens in the form of up-front disparities in tax burdens or credits that fall unequally between residents and nonresidents. No such unreasonable up-front tax burdens or credits are contained within the Colorado Refund Statute.

Also supporting the notion that the Refund Statute does not create a burden is the fact that the refund is not only delayed, its receipt is uncertain even for otherwise qualified recipients. For any given tax year it is impossible to determine in advance whether there will be a surplus or its precise amount. Therefore, it is uncertain whether refunds will be given or in what amounts they will be given. The only certainty under the Refund Statute's scheme is that a refund will occur, if at all, well after the applicable tax year, i.e. a back-end refund. An uncertain, back-end refund does not result in an unreasonable burden. While the rights of an individual to travel freely among the states and to pursue a livelihood in a State other than one's own are protected by

the privileges and immunities clause, Colorado's refund statute does not interfere with either. Just as in *Baldwin*, plaintiffs "do not--and cannot--contend that they are deprived of a means of a livelihood by the [effect of the Refund Statute] or of any access to any part of [Colorado] to which they may seek to travel." *Baldwin* at 388. The Refund Statute is not an attempt to impose burdens on nonresidents; it is simply a rational attempt to identify those who contributed most to the surplus in the context of a sales tax refund.

Plaintiffs' Claim of Violation of Equal Protection

Plaintiffs assert that limiting tax refunds to full-year Colorado residents is a violation of the equal protection clause of the United States Constitution. Insofar as the distinction complained of is between residents and non-residents, the court believes that the forgoing privileges and immunities clause analysis is more germane. The equal protection argument may, however, have more applicability where full-year residents are distinguished from part-year residents, since the distinction involves length of residency rather than citizenship.

The Refund Statute Does Not Inhibit the Fundamental Right to Travel

Plaintiffs allege that the Refund Statute requires strict scrutiny under the equal protection clause of the Fourteenth Amendment to the United States Constitution because the Refund Statute affects a fundamental right, being the right to travel. Fundamental rights are those which are of such character that they cannot be denied without violating those

fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *Powell v. Alabama*, 287 U.S. 45, 67 (1937). "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

Plaintiffs rely upon and *Shapiro v. Thompson*, *id*, and *Saenz v. Roe*, 526 U.S. 489 (1999) in support of their argument that legislation that conditions benefits upon residency violates the right to travel without penalty. Those cases involved welfare benefits that were conditioned on residency. While it is easy to see that immediate access to welfare benefits can negatively affect the ability of a person to move to a new state, the mere possibility of receiving a future tax refund does not have a like affect. A person who moves to this state cannot reasonably expect to receive a future tax refund, even if otherwise qualified, because one cannot count on there being a surplus; nor is there any assurance that the legislature will use the same method to refund any future surplus. No evidence has been brought to the court's attention demonstrating that the Refund Statute is any factor at all in the decision of any person to travel to or move to Colorado. Colorado's Refund Statute neither legislates upon the type of "state services" considered in *Shapiro* and *Saenz*, nor does it penalize the occasional visitor or new resident to Colorado by, e.g., actually imposing a more punitive income or sales tax than similar taxes paid by Colorado residents.

Appendix B

There is no evidence that suggests a negative or inhibitory effect upon Plaintiffs' right to travel. The statute does not impose any restrictions or limitations upon travel in or out of Colorado, nor do the affidavits submitted by Plaintiffs hint at any barrier to interstate travel. The statute's effect upon Plaintiffs is solely the consequence of their choosing not to reside (and/or intend to reside) in Colorado for a full calendar year. The statute imposes no penalty upon any individual's decision to either establish or forego residence in this state.

Plaintiffs have failed to demonstrate an impact upon their right to travel sufficient to trigger a strict scrutiny analysis. Therefore, the Refund Statute will be scrutinized under the rational basis test, which requires that legislative choices bear a rational relationship to legitimate state objectives. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901 (Colo. 1993).

The Refund Statute Does Not Implicate Necessities of Life, Essential Services, or Permanent Denial of Eccnomic Benefits

The cases relied upon by plaintiffs for their equal protection argument are distinguishable from the instant case. Plaintiffs rely upon cases in which actual penalties such as denial of a necessity of life; denial of a basic service; or a recent resident's permanent denial of the opportunity to "earn" dividends at the same rate as longer-term residents, are imposed upon recent (and final) travel.

The Refund Statute does not create a fixed permanent residency requirement, immutable by a person's establishment

of residency at a later point in time. *Zobel v. Williams*, 457 U.S. 55 (1982) and *Hooper v. Bernalillo County*, 472 U.S. 612 (1985), involve fixed permanent residency requirements that were immutable by a person's establishment of residency at a later time. For example, in *Zobel*, a person had to be a resident of Alaska prior to 1959 in order to be entitled to receive a certain level of mineral fund dividends from the state. A recent resident of Alaska could never achieve the right to receive mineral fund dividends at the same level as a longtime resident, no matter how long they lived in Alaska. Whereas in *Zobel* the most favored status was permanently unattainable by one who established residency after a certain date, in the instant case, residency for one calendar year entitles the taxpayer to the full refund for that taxpayer's classification. Therefore, the Refund Statute arguably creates a waiting period, but not a permanent exclusion.

Nor does the refund constitute, in grant or denial, either a basic necessity of life or an essential service, as in *Shapiro v. Thompson*, *Saenz v. Roe*, or *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Refund Statute, by its terms, applies only to a specified tax year and has no prospective application. Up front, all taxpayers are treated equally. Regarding future tax years, no one can expect to be included in or excluded from a refund, because there can be no guarantee that there will be a surplus, nor is there any assurance that the legislature will choose the same method to refund the surplus. The mere possibility of receiving a backend tax refund at some time in the future, in an amount equaling less than one per cent of adjusted gross income, simply cannot be said to implicate any basic necessity of life or any essential service.

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The statutes that were held unconstitutional in Shapiro were purposeful in their specific objective to exclude the poor from the State and also to inhibit immigration by needy persons, both purposes which would clearly and directly implicate the right to travel. The "penalty" imposed upon exercise of that right was immediate and substantial, i.e., denial of welfare benefits unless the applicant could establish residency for one year immediately preceding their request. Those statutes effected a two-tier classification of similarly situated persons, i.e., a category of needy persons with at least one-year residency and a category of needy persons with less than one-year residency. The Supreme Court found the challenged statutes in *Shapiro* to be overly broad, noting that they created nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits without any record support for such presumptions. In striking down the offending statutes, the *Shapiro* court rejected the argument that a distinction between new and old residents could be justified by the greater level of tax contribution made by longterm residents. In doing so, the Supreme Court pointed out that such a distinction could justify denying access to such basic services and benefits as schools, parks, libraries, police and fire protection. Colorado's statute neither denies access to any such basic service or benefit, nor does Colorado's refund compare to a basic necessity of life such as the welfare benefits, which were actually at issue in *Shapiro*. The *Shapiro* court noted that there was "weighty evidence" that exclusion of the poor was the "specific objective" of the challenged statutes. That Court also noted the lack of record support to justify, the waiting period requirement as a means of accomplishing the

stated administrative justifications of facilitating budget predictability and to prevent fraud. The record support in justification of Colorado's Refund Statute not only establishes a relationship between the classifications and the statute's purposes, but also establishes supporting factors beyond the mere fact of residency.

Plaintiffs also rely upon *Williams v. Vermont*, 472 U.S. 14 (1985) and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) in support of their equal protection argument. The stated purpose of the challenged statute in *Williams*, which imposed a sales and use tax upon certain Vermont motor vehicle registrants, was to "improve arid maintain the state and interstate highway systems, [and) to pay the principal and interest on bonds issued for the improvement and maintenance of those systems. . . ." *Williams v. Vermont* at 18. A credit for the amount of out-of-state sales tax paid by a Vermonter on his out-of-state purchase was given at the time the Vermonter ultimately registered his car in Vermont. A similar sales tax credit was not, however, granted if the buyer had not been a Vermont resident at the time of out-of-state purchase, although he had become a Vermont resident at the time of motor vehicle registration. In striking down the statute on equal protection grounds, the Williams court found that while "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation," the Vermont statute violated equal protection by arbitrarily distinguishing between persons "similarly situated for all relevant purposes," i.e., those who were residents when they purchased their motor vehicles versus those who were not residents when they purchased their motor vehicles.

Id at 23. The court noted that the "distinction between them bears no relation to the statutory purpose." *Williams* at 24. By contrast, the Refund Statute distinguishes between classes of full year residents, part year residents and nonresidents based on the legitimate purpose of refunding the surplus to those who contributed most to its creation, and thus the distinctions made by the Refund Statute are sufficiently related to its legitimate purposes to withstand an equal protection challenge.

In *Metropolitan Life*, out-of-state insurance companies challenged Alabama's domestic preference tax statute that imposed a higher tax upon them than it imposed upon domestic insurance companies, and resulted in a foreign insurance company having to pay three to four times as much in gross premiums taxes as its domestic competitors. Even by availing itself of in-state investment incentives, a foreign insurance company could never reduce its gross premiums tax rate to the same level paid by comparable domestic companies. "The State's investment incentive provision therefore does not cure, but reaffirms; the statute's impermissible classification based solely on residence." *Metropolitan Life* at 881. The Supreme Court found that the preference tax statute violated the equal protection clause because the tax burdened outsiders, and not solely because it favored in-state interests. Like *Zobel*, but unlike the instant case, the distinction between resident and non-resident insurance companies was permanent; the favored status enjoyed by in-state companies was unattainable by out-of-state companies.

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The Refund Statute Sufficiently Achieves its Intended Purposes

Taxpayers do not have a right to a uniform excise tax rate, such as sales or income tax. *Cherry Hills Farms, Inc. v.* City of *Cherry Hills Village*, 670 P.2d 779 (Colo. 1983). "In taxation, even more than in other fields, the legislature has greater freedom to classify. . . . Possible differences in tax burdens not shown to be substantial or which are based on discriminations not shown to be arbitrary and capricious do . . . not fall within constitutional prohibitions." (*See Friends of Chamber Music v. City & Co. of Denver*, 696 P.2d 309, 321 (Colo. 1985) (citations omitted). In resolving constitutional challenges to state tax measures, the Supreme Court has made it clear that "in taxation, even more than other fields, legislatures possess the greatest freedom in classification. " *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975).

Much of plaintiff's argument is an attempt to show that different refund mechanisms are more effective than the method chosen by the General Assembly, in addition to being nondiscriminatory. In enacting the Refund Statute, the legislators were not required to weight the relevant factors in favor of any particular one, but were only obligated to consider a range of factors, and the record clearly demonstrates that they did so. Plaintiffs' argument, while couched in language of discriminatory effect, is essentially one of weight, i.e., that the State should have weighted certain refund options and factors more heavily than others, and settled upon different refund mechanisms, which Plaintiffs describe as "constitutionally permissible." However, these

alternative refund mechanisms preferred by Plaintiffs (general sales and tax reductions), would not necessarily have satisfied the temporal or depletion requirements of Section (7) (d) of the TABOR Amendment that "the excess shall be refunded in the next fiscal year." Plaintiffs may well have proposed a better way to comply with the TABOR Amendment, but the court may not second guess the General Assembly in its choice of how to comply. The legislature is not required to use the best method to achieve its intended goals; indeed, the political compromises necessary to the enactment of legislation generally preclude the optimal solution to any problem. It is only required that a constitutionally permissible method be employed. That plaintiffs' proposed alternative might be more effective than the General Assembly's method is not something the court can properly consider.

The Refund Statute does not violate the guarantee of equal protection because the disputed residency classifications that distinguish the qualified from the non-qualified recipients bear a rational relationship to the State's objectives to comply with a state constitutional mandate; to refund to a large group; to prevent fraud; to guard against federal taxation on the refund; and to refund the surplus to those who contributed most to its creation. Additionally, the Refund Statute does not significantly affect the right to travel or any other fundamental right, does, not involve basic benefits or services or otherwise affect the necessities of life, and has a rational basis and a legitimate purpose in attempting to refund the surplus to those who contributed most to its creation.

Appendix B

Plaintiff's Claim of Violation Of The Commerce Clause

The dormant power or "negative aspect" of the commerce clause prohibits the States from unjustifiably discriminating against or burdening the flow of interstate commerce. In the cases cited by the parties in support of their respective arguments, the harm against which the commerce clause guards is expressed in terms of draconian effect, such as the "evil of protectionism," "economic balkanization," "economic isolationism," "distortion of normal market incentive," "imposition of an artificial rigidity on the economic pattern of [an] industry," and "imposition of a straitjacket on [the disadvantaged party]." Thus, it is clear that the impact on commerce must be beyond that which is merely incidental or remote before a state law is struck down. Plaintiffs argue that the refund statute negatively affects interstate commerce by discouraging out-of-town guests from traveling to Colorado, thereby burdening interstate commerce, under the "economic barrier" rationale of *Dean Milk Co. v. City of Madison, Wis., et al.*, 340 U.S. 349 (1951), and other cited cases. Plaintiffs also argue that the refund statute is subject to the "virtually per se rule of invalidity" because it is facially discriminatory. *Hughes v. Oklahoma*, 441 US. 322 (1979). The State, however, asserts that the refund statute is nondiscriminatory and must be analyzed by the lesser "balancing test," which weighs the burden imposed on commerce against the local benefits. *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970).

A state statute alleged to violate the commerce clause can be upheld if it does not discriminate against interstate commerce. Discrimination occurs by either disparate

treatment of those similarly situated, or by differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. A statute can also be upheld, even when discriminatory, where the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

The facts in *Camps Newfound/Owatonna v. Town of Harrison, Maine*, 520 U.S. 564, involved a statutory property tax exemption which excluded those church camps which operated principally for the benefit of nonresidents. In striking down the statute under the commerce clause, the court found that it functioned as an "export tariff" and that "the denial of the tax exemption is explicitly and primarily triggered by engaging in a certain level of interstate commerce." *Camps Newfound/Owatonna* at 570. The court further found that the effect of such discrimination upon commerce was "substantial" as it expressly distinguished between entities that serve a principally interstate clientele and those that primarily serve an intrastate market. Unlike Colorado herein, the governmental entity in *Camps Newfound/Owatonna* could not defend the statute by establishing any countervailing legitimate local purposes.

The facts in the present case are also distinguishable from those in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 279 (1988), wherein Ohio's justifications for the discriminatory statute (health and reciprocity) were found to be "implausible speculation" and merely "an occasional and accidental effect of achieving what is its purpose, favorable tax treatment of Ohio-produced ethanol."

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A Massachusetts state pricing order that subjected all fluid milk sold by dealers to Massachusetts retailers to an assessment, the proceeds of which were then distributed exclusively to Massachusetts dairy farmers, was held to unconstitutionally discriminate against interstate commerce for two reasons that are not implicated in the present case: (a) the pricing order was funded principally from taxes on the sale of milk produced in other states, an effect which clearly burdened interstate commerce, and (b) because of the potential for legislative abuse where the same in-state group is both simultaneously taxed and then "mollified" by a subsidy on the same product, thereby eroding the principle that "a State's own political processes will serve as a check against unduly burdensome regulations." *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200-201 (1994). The Court also noted that while "a pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce," the danger to interstate commerce arose from conjoining a tax and subsidy on a product, the overwhelming majority of which was produced out of state. *See West Lynn Creamery* at 200. In contrast, the excess revenue fund here is funded only in small part from taxes paid by non-residents or part time residents of Colorado and its refund to Colorado residents is not for the purposes of neutralizing competition or placing Colorado in a position of economic isolation.

Plaintiffs argue that Colorado's Refund Statute is subject to the "virtually per se rule of invalidity," a test that applies not only to those laws motivated solely by a desire to protect local industries from out-of-state competition, but also to those laws that respond to legitimate local concerns by discriminating arbitrarily against interstate commerce."

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 343 (1992). Whether analyzed either under the lesser balancing test of *Pike v. Bruce Church, Inc.* (the test urged by the State) or by the more stringent test urged by Plaintiffs, the court determines that Colorado's Refund Statute is constitutional. As the court has already determined that the qualified Colorado recipients and the Plaintiffs are not similarly situated for relevant purposes, the statute is not facially discriminatory. For the reasons set out above, the differential treatment effected by the Refund Statute in limiting refunds to full year residents is not a significant burden on these defendants. However, even if the refund statute fell within those laws subject to the highest scrutiny, the State has met its burden of supporting the classifications within the statute with valid factors unrelated to economic protectionism.

CONCLUSION

On the issue of liability, judgment enters in favor of Defendant State of Colorado and against Plaintiffs. The Court finds that Plaintiffs have failed to meet their burden of establishing, beyond a reasonable doubt, that the statute is unconstitutional. *Turner v. Lyon*, 539 P.2d 1241 (1975). The Court finds that the refund statute does not violate principles of equal protection, privileges and immunities, or the commerce clause and that any impact or effect caused by the statute's classifications is remote or incidental. In construing the Refund Statute, the Court relies upon the expression of legislative intent at C.R.S. 39-22-120 that excess revenues must be refunded as a means of limiting the annual growth of fiscal year spending in compliance with the TABOR

Amendment mandate. There is no intent or purpose therein to discriminate against those persons who are ineligible to receive the refund; rather, the statutory distinctions between full-year residents, part-year residents and nonresidents are for legitimate purposes.

Claim under Title 42 U.S.C., Section 1983:

The Court finds that Plaintiffs have failed to state a cognizable claim under Title 42.

Alleged violation of the Tabor Amendment:

Having found the statute constitutional, the Court also finds that there has been no "revenue collected, kept, or spent illegally," and, therefore, no violation of the TABOR Amendment.

The statute reasonably carries out the mandate of the Tabor Amendment. The residency classifications set forth therein are reasonably and rationally related to the purposes previously discussed. TABOR expressly excludes "refunds" from the requirement of a flat tax rate.

So Ordered this 19th day of December, 2002.

s/ [illegible]
District Court Judge

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APPENDIX A

The record, as reflected in the supporting documents submitted by each side, establishes that the legislators complied with their statutory duty to consider certain factors in their determination of which refund mechanism constituted a "reasonable method of refund," in light of the "best information available at the time." The lawmakers were provided with information bearing upon (a) the administrative limitations on then-existing residency or payment identifiers; (b) the administrative costs of implementing a new refund mechanism; (c) the effectiveness of using the existing income tax system as the refund mechanism; and, (4) the potential impact upon the future economic/TABOR picture in effecting a temporary sales or tax reduction. While Plaintiffs take repeated exception to some of the factors considered by the legislators, e.g. the per-person amount of refund and the administrative costs, the statute clearly provides for such consideration. (See C.R.S. 39-22-120 (1)(h)). The parties have submitted voluminous supporting documents, including copies of various fiscal studies, memoranda, and post-enactment deposition transcripts of state employees. These materials collectively illustrate the following information which was presented to the lawmakers by a variety of sources including the state's Department of Revenue and the Legislative Council, prior to enactment of the statute:

a. Of the alternative methods considered by the State, the method of refund selected is neither the least costly nor the most administratively convenient. Various refund options were considered for the initial FY 96-97 refund.

These options encompassed a cost within the approximate range of $66,000.00 to $627,000.00. A *temporary* reduction of either sales or income tax would have been a more "direct" method of refund but would raise additional issues, not intended by TABOR. For, example, a temporary reduction of the tax liability would not necessarily fulfill the TABOR requirement that excess revenues must be refunded within one year of receipt. (Colorado Legislative Council Staff memorandum, June 5, 1997). Similarly, neither would a temporary reduction of the sales and use tax rate assure that the exact amount of the mandated refund would occur, as it would necessarily be dependent upon the vagaries of consumer spending patterns. Another example is that, pursuant to a different statute, ten percent of sales and use taxes collected are transferred to the. Highway Users Tax Fund ("HUTF"); a temporary sales tax reduction would result in a corresponding reduction of transfer to the HUTF. (See Fagan deposition exhibit 34).

b. The pool from which the refund monies is drawn consists of revenue from many sources.

c. The largest contribution to the refund pool is income tax revenue, which is paid by both full year residents as well as part-time or non-residents who may have worked in Colorado during any portion of the tax year. The ratio of contributions to the refund pool, by way of example, in FY 97-98 Colorado residents paid 73% of state taxes and nonresidents paid 4%. Colorado residents paid 91 % of state income taxes and non residents paid one

percent of state income taxes. Colorado residents paid 55% of sales and use taxes and non residents paid 10% percent of sales and use taxes. In the years preceding the first TABOR surplus, the Department of Revenue estimated non-resident returns to average 1.2 percent of total state returns filed. (Huyghebaert deposition exhibit 70). Nonresidents, primarily tourists paid 10% of sales and use taxes. (Plaintiffs have not disputed Defendants' contention that Colorado residents pay the overwhelming majority of the revenue pool from which the refund is drawn). "The revenues which contribute to the TABOR excess change from year to year, depending upon their growth rate." (Fagan deposition exhibit 44).

d. More Coloradans pay state sales tax than any other tax.

e. Recreational or business visitors are subject to some of the same taxes (i.e., sales tax) as "qualified" Colorado residents. The State does not collect or compile sales tax data based upon a "qualified or non-qualified" taxpayer designation. (Fagan deposition exhibit 51).

f. If the refund were to be identified as excess income taxes, it would be subject to federal taxation; however, if the refund were identified as excess sales and use payments, the refund could be subject to federal taxation. "The state believes that all of the revenue composing the TABOR base came from individual or business income that was already taxed. While the refund may be distributed through the income tax system, it is not precisely a refund of income taxes. The state takes the position that the TABOR refund is not new income and that it provides citizens with no tax benefit." (Fagan deposition exhibit 29).

g. Some of the non-resident and non-qualified persons can be identified through the state income tax system.

h. The present system does not distinguish at what point of the calendar year a nonresident arrives in the State. The administrative cost of verifying the length of a part-time resident's Colorado residency would be approximately $95,000.00.

i. Issuing checks outside an existing system that already processes checks for most of the potential recipients would increase costs of mailings and processing. Postage alone would exceed $800,000.00 (Fagan memo to Governor Romer, September 2, 1997).

j. A temporary sales tax reduction as a means of effecting TABOR would involve implementation of the following steps: notification of the temporary sales tax reduction to thousands of business accounts; notification to these same business accounts upon expiration of the temporary sales tax reduction period; requirement that businesses file supplemental forms detailing collection of both the "usual" sales tax and the "temporarily reduced" sales tax; and finally, assessment of compliance through business account audits.

k. "[T]here is currently no way to determine how long a resident has been in the State. If part-year residents are included in the eligibility group, all part year residents will receive the full refund amount-regardless of whether they have been in the state 9 months or 1 month. The current income tax system has neither the data nor the

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functionality to determine the length of residency and cannot pro-rate the refund amount or exclude a specific sub-set of part-year residents. Confirmation of length of residence would require modification to the income tax form, additional data entry, additional programming time, and additional processing of paper resulting from proof of residency. Additionally there would be a limited ability to catch fraud regarding the length of residency in the state. . . ." (Fagan deposition exhibit 24).

l. "[T]here is currently no way to distinguish between part-year residents and non-residents. At present, these filers file the same [tax] return and the forms are not designed to differentiate between the two groups. "[Differentiation between these two groups] would-involve modification to the income tax return and would require additional data entry. If a new document code is established to differentiate between the two groups, the entire computer system will have to be changed which is cost prohibitive." (Fagan deposition exhibit 24).

m. "We recommend that minors who earn income and have an income tax liability get a TABOR refund, even if they are claimed as dependents on their parents' return. The state income tax system does not require the identification of adult exemptions or dependents. To block refunds to minors, we would have to require each taxpayer to identify adult exemptions and dependents on the state form and data enter that information. The computer would have to select out minor dependents based upon social security matches

with their parents' return and block the refund. It is easier to give minors with income a refund. (Fagan deposition exhibit 25).

n. "While the opportunity for fraud is present in today's tax system, whenever the state gives money to people who had no previous liability the opportunity for fraud increases. Essentially people will use more than one name or create fictitious social security numbers. In addition if we are serving people who are not previously in the system, it is possible that people from neighboring states will apply for the refund using a Colorado address. It is also possible that immigrants who are temporarily (and perhaps illegally here) will apply, which puts [the Department of Revenue] in the position of having to determine legal status in this country. Based upon our experiences with issuing ID cards to this group through the drivers license offices this summer, determining legal immigration status is also very challenging and stressful." (Fagan deposition exhibit 25). "[T]he potential for fraud exists and there is little the Department can do to catch people cheating on the refund. As many of the non-filer population will not be filing a federal return, there is no other database match with which to compare the "new" filers. The figures in this fiscal note are based on adult filers-yet the [Revenue] Department has no way to verify the age of the filers. Consequently, children or "minors" could file for this refund. (State of Colorado Legislative Council Fiscal Note Worksheet, June 12, 1997).

o. Part-year and nonresidents "should be ineligible because they may not have lived here during the fiscal year in which the TABOR surplus was generated or because they really do not mean to be a Colorado resident. Administratively, declaring this group ineligible eliminates a special tracking category and programming need." (Fagan deposition exhibit 25).

p. Benefits of the per person refund vis a vis rate reduction are: a refund reaches a broad base of persons; a refund gets more money to lower and middle income people than an income tax rate reduction would; and, unlike a refund, a rate reduction cannot be controlled and could generate greater [future] revenue reduction than projected. (See Fagan deposition exhibit 44).

APPENDIX C -- ORDER OF THE SUPREME COURT, STATE OF COLORADO DENYING PETITION FOR WRIT OF CERTIORARI DATED FEBRUARY 14, 2005

SUPREME COURT, STATE OF COLORADO
TWO PAST 14th AVENUE
DENVER, COLORADO 80203

CERTIORARI TO THE COURT OF APPEALS,
03CA0243

DISTRICT COURT, CITY & COUNTY OF DENVER,
99CV2974

CASE N0. 04SC796

Petitioners:

JOHN K. THORPE; ELISHA E. SPRONG; DARRELL J. VIGIL; SEAN P. LEY; and HECTOR JUAREZ, individually and on behalf of all others similarly situated,

v.

Respondents:

STATE OF COLORADO and FRED FISHER, in his official capacity as Executive Director of the Colorado Department of Revenue and Tax Collector for the State of Colorado.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

Appendix C

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 14, 2005.

APPENDIX D — RELEVANT STATUTE

C.R.S.A. § 39-22-120. Legislative declaration—state sales tax refund—credit against state income tax

(1) The General assembly hereby finds and declares that:

(a) Section 20 of article X of the state constitution, which was approved by the registered electors of this state in 1992, limits the annual growth of state fiscal year spending;

(b) During the 1997-98 fiscal year, state revenues from sources not excluded from state fiscal year spending exceeded the limitation on state fiscal year spending;

(c) When revenues exceed the state fiscal year spending limitation for any given fiscal year, section 20(7)(d) of article X of the state constitution requires that the excess revenues be refunded in the next fiscal year unless voters approve a revenue change allowing the state to keep the revenues;

(d) In addition, section 20(1) of article X of the state constitution states that refunds need not be proportional when prior payments are impractical to identify or return and authorizes the use of any reasonable method for refunding excess revenues;

(e) Since voters have not approved a revenue change, the state is required to refund during the 1997-98 fiscal year the revenues in excess of the state fiscal year spending limitation for the 1996-97 fiscal year;

(f) It is within the legislative prerogative of the general assembly to enact legislation to implement the refund of state excess revenues for the 1997-98 fiscal year in compliance with section 20 of article X of the state constitution;

(g) It is a reasonable and necessary exercise of the legislative prerogative to determine that, due to the impossibility of identifying or returning prior payments, it is not feasible to make proportional refunds of state excess revenues;

(h) It is also a reasonable and necessary exercise of the legislative prerogative to determine what constitutes a reasonable method of refunding state excess revenues after consideration of the best information available at the time regarding: The amount and source of excess revenues to be refunded; the qualifications for and number of eligible recipients; the amount of refund each recipient should receive; the necessary procedures to claim and make refunds; and the related administrative expenses;

Appendix D

(i) It is the considered judgment of the general assembly that:

(I) The state excess revenues for the 1997-98 fiscal year are derived from a wide variety of state taxes and fees ranging from state sales tax to severance and transportation taxes to health service fees to court fines to permit and license fees and to higher education fees and should, therefore, be returned to as large a group of Colorado residents as is identifiable and economically feasible;

(II) It is not feasible to make proportional refunds of state excess revenues for the 1997-98 fiscal year due to the impossibility of identifying or returning prior payments;

(III) It is reasonable and fair to refund state excess revenues for the 1997-98 fiscal year to a large group of individuals as a refund of state sales tax revenues since more Coloradans pay state sales tax than any other state tax;

(IV) The state collected over one billion four hundred fourteen million dollars in state sales tax revenues during the 1997-98 fiscal year from which the refund of state excess revenues may be made;

(V) Refunding state excess revenues for the 1997-98 fiscal year through the state income tax system in the manner set forth in this section is a reasonable method for refunding such excess revenues; and

(VI) The most cost-effective and expeditious method of refunding state excess revenues for the 1997-98 fiscal year is through the state income tax system but that a refund offset against state income tax liability is merely a mechanism for refunding said state excess revenues to a broad spectrum of persons.

(2) As used in this section, "qualified individual" means:

(a) A natural person who is domiciled in this state for the entire taxable year commencing on January 1, 1997, and ending December 31, 1997, and who is required to file a Colorado individual income tax return for that tax year pursuant to section 39-22-601(1)(a) or who files a Colorado individual income tax return to claim a refund of Colorado income tax withheld from wages for that tax year; or

(b) Any natural person who is domiciled in this state for the entire taxable year commencing on January 1, 1997, and ending December 31, 1997, and who is at least eighteen years of age as of December 31, 1996.

(3) With respect to the taxable year commencing on January 1, 1998, and ending December 31, 1998, there shall be allowed to each qualified individual a state sales tax refund in an amount specified in subsection (4) of this section with respect to the income taxes imposed by this article.

(4) The amount of the refund allowed under this section shall be as follows:

(a) For a qualified individual filing a single return for the 1997 tax year:

(I) If the qualified individual's federal adjusted gross income for the 1997 tax year is less than or equal to fifteen thousand dollars, the credit shall be in the amount of thirty-seven dollars;

(II) If the qualified individual's federal adjusted gross income for the 1997 tax year is greater than fifteen thousand dollars but not more than one hundred thousand dollars, the credit shall be in the amount of sixty dollars;

(III) If the qualified individual's federal adjusted gross income for the 1997 tax year is more than one hundred thousand dollars, the credit shall be in the amount of eighty dollars.

(b) For two qualified individuals filing a joint return or a qualified individual filing as a surviving spouse for the 1997 tax year:

(I) If the qualified individuals' aggregate federal adjusted gross income is less than or equal to fifteen thousand dollars, the credit shall be in the amount of seventy-four dollars;

(II) If the qualified individuals' aggregate federal adjusted gross income is greater than fifteen thousand dollars but not more than one hundred thousand dollars, the credit shall be in the amount of one hundred twenty dollars;

(III) If the qualified individuals' aggregate federal adjusted gross income is greater than one hundred thousand dollars, the credit shall be in the amount of one hundred sixty dollars;

(5)(a) Any credit allowed pursuant to this section shall be claimed by a qualified individual as defined in paragraph (a) of subsection (2) of this section by timely filing a 1997 income tax return with the

department of revenue in compliance with the provisions of this article. The department of revenue shall not allow said credit claimed on any 1997 income tax return not filed in compliance with the provisions of this article. In no event shall the credit claimed by a qualified individual as defined in paragraph (a) of subsection (2) of this section on any 1997 income tax return be allowed if said return is filed after October 15, 1998.

(b) Any credit allowed pursuant to this section shall be claimed by a qualified individual as defined in paragraph (b) of subsection (2) of this section by filing a 1997 income tax return with the department of revenue no later than April 15, 1998. The department of revenue shall not allow said credit claimed by a qualified individual as defined in paragraph (b) of subsection (2) of this section on any 1997 income tax return filed with the department of revenue after April 15, 1998.

(6) If the credit allowed under this section exceeds the income taxes otherwise due on the claimant's income, the amount of the credit not used as an offset against income taxes may not be carried forward as a tax credit against subsequent years' income tax liability and shall be refunded to the claimant.

(7) In addition to any other penalties allowed by law, any person who claims but is not eligible to claim the credit allowed pursuant to this section shall be subject to the criminal penalties imposed pursuant to section 39-21-118, as applicable.

APPENDIX E — EXCERPT OF REVIEW OF HB 98-1412 DATED APRIL 22, 1993

DEPARTMENT OF REVENUE
FOR INTRA-DEPARTMENTAL CORRESPONDENCE

TO: Becky Wetzel **DATE:** April 22, 1993

FROM: James K. Hinz and Art Crespin

SUBJECT: Review of HB 98-1412

Art and I met with Richard and Phil to discuss this bill.

Recap: This bill is very similar to the special session bill designed to distribute the excess revenues of the state as a refund of sales tax. Certain changes have been made:

- If the voters do not authorize the state to retain and spend all *or any portion* of the excess this bill will distribute 55% of the excess required to be distributed.

- Persons serving a sentence in Colorado Dept of Corrections or US government facility at the time of filing will not qualify.

- Provides a calculation of the amount per level of Adjusted Gross Income.

- Requires DOR to calculate such amounts by October 1 unless a November ballot issue is addressing possible distribution. Then DOR is restricted from

calculation until result of the election is known. However, if the voters allow the state to retain all or part of the excess, then this bill can't kick in to refund 55% of the excess. There needs to be another mechanism. See **Identified Problems** below.

- Requires DOR to adjust AGI ranges annually based on Consumer Price Index.

- Requires DOR to promulgate rules regarding the amounts of federal adjusted gross income and publish such promulgated rules.

Who's In Who's Out:

- Same as last year except for those individuals serving a sentence noted above.

Areas of Concern:

- Taxability of the refund by the IRS under the Tax Benefit Rule. State of Minnesota, although quite different wording in their statute, reduced their excess revenues as a '**credit allowed against the tax imposed**' under their income tax statutes. Our statute says that excess revenues will be "refunded through the state income tax system but that a credit against state income tax is merely a mechanism for refunding . . .". We never use those words again but instead use the term "sales tax refund credit".

Appendix E

IRS has instructed Minnesota that as a credit against income tax it must be reported as income due to the tax benefit rule when applicable.

Although we feel our statute complies with the theory of refunding sales tax not reducing income tax, we feel that to further strengthen our argument that the income tax system is merely a means of distributing the sales tax refund, we suggest changing the word "credit" to "offset" (page 4, line 6 of bill).

* * * *

APPENDIX F— OTHER STATES' TREATMENT OF INCOME TAX REFUNDS DATED SEPTEMBER 8, 1997

DEPARTMENT OF REVENUE
FOR INTRADEPARTMENTAL CORRESPONDENCE

TO: Phil Spencer

FROM: Tina Bowman

DATE: September 8, 1997

SUBJECT: Other States' Treatment of Income Tax Refunds

MISSOURI

Contact: Mr. Clements, Attorney
(573)751-7727

Refund Status
The refund issue is still pending before the Supreme Court.

Method of Issuance

The surplus revenue came out of the general revenue fund. Missouri calculated that 60% of the surplus was attributed to sales and other business taxes and 40% of it came from income tax. Anybody who filed a return during the year would be eligible for the refund. Missouri would impose a time period to file for the refund. Missouri would issue a refund check then a W-2 or 1099G to individuals for 40% of the total refund.

Appendix F

IRS Treatment

Missouri has not done a lot of research on this refund issue. However, it is Missouri's opinion that the refund would be taxable under the IRS.

OREGON

Contact: Jeanine Horn-Ritchie, Asst. Director – (503) 945-8214
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Jim Bucholz, Policy and System Section – (503) 945-8670

IRS Treatment

Missouri has not done a lot of research on this refund issue. However, it is Missouri's opinion that the refund would be taxable under the IRS.

Refund Status

Oregon is currently in the process of issuing refunds to taxpayers. Refunding excess revenue to taxpayers is a common occurrence. Oregon's statute specifies that if revenue exceeds forecast or estimated revenue by 2% or more, Oregon will refund such excess to taxpayers. [(Oregon Rev. Stats. 291.349(6)(d)]

The surplus revenue comes from a general fund which consists mainly of income tax from individual and corporate taxpayers and minor taxes such as cigarette and tobacco taxes. Oregon does *not* have a sales tax.

Appendix F

Issuance of Refund

Oregon used to allow credit on following year's income tax return. However, the statute changed four years ago, and it mandated that Oregon issue actual checks to individual taxpayers by December. Corporations still claim the credit on their income tax returns. The statute allows for two different rates to be refunded to individuals and corporations. Currently 14.37% will be refunded to individuals based on their 1996 filing while corporations will receive 42.4% credit based on their 1997 income tax liability. Oregon would issue a 1099G to individuals for the refunds they receive. The 1099G will be broken out into the amount received for the surplus revenue refund and the amount for the regular state refund.

IRS Treatment

Such refunds for excess revenue are taxable to taxpayer if taxpayer itemizes deductions on the federal income tax return.

HAWAII

Contact: Lynn Garcia, Income Tax Specialist
(808) 587-1577

Refund Status

The proposed refund to citizens of Hawaii was withdrawn because there was no more surplus revenue. However, Hawaii had a method in place to issue the refund.

Appendix F

Method of Issuance

The surplus revenue came out of the general fund and the income tax return was the vehicle used to issue the refund. The following criteria were used to determine the eligibility of taxpayers to receive the refund through an income tax credit:

1) Must be residents of Hawaii for at least 9 months. Did not require physical presence but required taxpayers to treat Hawaii as their tax domicile.

2) Allowed credit for taxpayer, taxpayer's spouse and qualifying dependent. Note: A person who can be claimed as a dependent by another person does not qualify for the credit.

3) Credit (exemption) ranged from $1.00 to $225.00.

4) Inserted 1 line item on resident return form – Number of exemptions claimed – performed edit check.

5) Imposed a deadline – must claim credit during 12 months after the close of the tax year.

6) From a practical standpoint, Hawaii would allow the credit only if claimed on the return. If the taxpayer did not claim the credit, Hawaii assumed that the taxpayer did not qualify for the credit.

7) If a child is born after April 1, such child cannot qualify for child's own behalf. But if the mother qualifies under the 9-month requirement, then the child qualifies.

In effect, Hawaii would treat the refund of surplus revenue as an increase in the taxable refund to taxpayer

or a decrease in the tax paid deduction. For those taxpayers who receive a refund from the surplus revenue, Hawaii would issue them a 1099G which would include the amount of such refund.

IRS Treatment

Hawaii consulted with the local IRS office which issued a confidential opinion. Hawaii believed the local IRS office consulted with the Washington, D.C. office which would treat the refund as taxable to taxpayer.

APPENDIX G — CHART OF UNEQUAL TAXATION RESULTS WHEN THE SALES TAX REFUND IS ENFORCED

Unequal Taxation Results When the Sales Tax Refund is Enforced

The chart illustrates that unlike Preferred Residents, Lesser Residents and Non-Residents are penalized and forced to pay State sales tax on thousands of dollars of purchases because they are ineligible for sales tax refund.

For example, in 2000 a Preferred Resident who made more than $126,000.00 received a sales tax refund of $524.00 that, in essence, equates to an exemption of State sales tax on the first $19,793.10 of purchases. The Lesser Resident and the Non-Resident, both excluded from the refund, must pay taxes on the first $19,793.10 of purchases.

Appendix G

Year	Refund	Sales Tax Refund by Income Category		Purchases Exempt from State Sales Tax **
1997	$139,000,000	$0-15,000	$37	$ 1,276.86
		$15,001-1000,000	$60	$ 2,068.97
		$100,000 +	$80	$ 2,758.62
1998	$563,000,000	$20,000 -	$142	$ 4,896.55
		$20,001-50,000	$195	$ 6,724.14
		$50,001-95,000	$276	$ 9,517.24
		$95,001 +		$ 13,241.38
1999	$679,000,000	$25,000 -	$159	$ 5,482.76
		$25,001-50,000	$212	$ 7,310.34
		$50,001-75,000	$244	$ 8,413,79.
		$75,001-100,000	$290	$ 10,000.00
		$100,001-125,000	$312	$ 10,758.62
		$125,001 +	$502	$ 17,310.34

* Information on refund amounts and income categories distribution is from the Colorado Department of Revenue. *See, www.revenue.state.co.us.*

** The Colordo State state sales tax rate is currenty 2.9%.

Appendix G

2000	$941,000,000	$26,000 -	$182	$ 6,275.86
		$26,001-53,000	$245	$ 8,448.28
		$53,001-78,000	$288	$ 9,931.03
		$78,001-103,000	$325	$ 11,206.90
		$103,001-126,000	$363	$ 12,517.24
		$126,001 +	$574	$ 19,793.10
1997-2000	$2,322,000,000			

(2)

NO. 04-1541

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN K. THORPE, ELISHA E. SPRONG, DARRELL J. VIGIL, SEAN P. LEY AND HECTOR JUAREZ, individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE STATE OF COLORADO AND M. MICHAEL COOKE, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE AND TAX COLLECTOR FOR THE STATE OF COLORADO,

Respondents.

On Petition for Writ of Certiorari to
The Colorado Court of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Colorado's Taxpayer's Bill of Rights ("TABOR") sets limits for state government spending and requires that state revenue above that limit—revenue that comes from a wide variety of state taxes and fees—be refunded to the people. May the state make refunds only to full-year Colorado residents when the state legislature has concluded it is impossible to determine how much individuals paid in Colorado taxes and fees in a given year, but that full-year Colorado residents paid the bulk of them?

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STATEMENT OF THE CASE

Colorado voters passed in 1992 an amendment to the Colorado Constitution known as the Taxpayer's Bill of Rights, or TABOR. Colo. Const. art. X, § 20 (Resp. App. 1). TABOR limits the growth of government spending to a formula of inflation plus population growth. *Id.* at § 20(7)(a). It also requires that "excess" revenue above that spending limitation be refunded the next fiscal year using "any reasonable method." *Id.* at §§ 20(1) and (7)(d). The only way to avoid the TABOR spending limitation is by a vote of the people. *Id.* at § 20(1).

The Colorado General Assembly enacted the statute challenged in this case, C.R.S. § 39-22-120,[1] to refund excess revenue collected by the state during the 1997-98 fiscal year. *See* § 39-22-120(1)(e). The General Assembly found that the "excess revenues for the 1997-98 fiscal year are derived from a wide variety of state taxes and fees ranging from state sales tax to severance and transportation taxes to health service fees to court fines to permit and license fees and to higher education fees . . . ." § 39-22-120(1)(i)(I). Because the excess revenue came from so many sources, it was "impossib[le]" to "identif[y] or retur[n] prior payments." § 39-22-120(1)(i)(II). In other words, there was no way to track what particular individuals paid in

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[1] Petitioners appear to be challenging the statute refunding excess revenue collected during the 1997-98 fiscal year. *See* Petn. at 10 and Pet. App. D. However, petitioners' Appendix D is an amalgam of the 1996-1997 and 1997-98 statutes. Respondents have included the proper text of the 1997-98 statute in their Appendix. *See* Resp. App. 2. Additionally, petitioners state that they are challenging § 39-22-120 "as enacted and amended," Petn. at 10, presumably referring to subsequent statutes dealing with excess revenue refunds. *See* C.R.S. §§ 39-22-2001 through 39-22-2003. Because the residents-only distinction was drawn in the subsequent statutes as well, respondents will refer to the "excess refund procedure."

a year and refund that amount. *Id.* (finding that "it is not feasible to make proportional refunds of state excess revenues").

Given this uncertainty, the General Assembly decided that the most "cost-effective and expeditious method" of refunding excess revenue would be to use the state income tax system. § 39-22-120(1)(i)(VI). In determining who would receive a refund, it focused on the fact that the excess revenue consisted primarily of sales tax, and that Colorado residents paid the bulk of that tax. § 39-22-120(1)(i)(III). It therefore decided to refund the excess revenue to full-year state residents who filed income tax returns. § 39-22-120(2).

Petitioners are non-residents and part-year residents who seek to share in the refund of Colorado's excess revenues. They brought suit in state court against the State of Colorado and Fred Fisher, in his official capacity as Executive Director of the Department of Revenue and Tax Collector for the State (collectively "respondents"),[2] claiming their lack of a refund violates the Privileges and Immunities Clause, the right to travel, the Equal Protection Clause, and the dormant Commerce Clause. The district court granted summary judgment in respondents' favor on all claims in an unpublished opinion. *See* Pet. App. A. The Court of Appeals affirmed, sustaining the excess refund procedure on the ground, *inter alia*, that given the "wide variety of taxes, fees, and other . . . revenue sources that produce the excess revenue, most of which apply only to full-year residents, the General Assembly could reasonably conclude that full-year residents paid most of the money into the revenue fund." *Thorpe v. State of Colorado, et al.*, 107 P.3d 1064, 1069 (Colo. App. 2004). The Colorado Supreme

[2] Fred Fisher has been succeeded by M. Michael Cooke. Petitioners changed the caption of the case accordingly in this Court.

Court denied certiorari. *Thorpe v. State*, 2005 WL 334196 (Colo. Feb. 14, 2005).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Involves Colorado's Unique Budgeting System

This case does not merit the Court's attention because it involves a unique and narrow set of circumstances. The restrictions on taxation and government spending in Colorado, a system known as the Taxpayer's Bill of Rights ("TABOR"), stand alone as the strictest in the country. *See* Kathleen J. Gebhardt, "Challenges to Funding School Facilities in Colorado," 83 Neb. L. Rev. 856, 857 (2005) (noting that TABOR "is the strictest tax and expenditure law in the country"); Fred Holden, "A Decade of TABOR," Independence Institute Issue Paper at 1 (June 2003) (available at http://i2i.org/article.aspx?ID=559) ("Colorado has in TABOR the strictest tax-and-spending limitation of the 50 states."). What makes Colorado's system unique is the fact that it limits the growth of government spending to a formula of inflation plus population growth, and requires a vote of the people to change the limit. Colo. Const. art. X, §§ 20(1) and (7)(a).[3] It also mandates that any "excess" revenue over that limit be refunded to the people using a "reasonable method." Colo. Const. art. X, §§ 20(1) and (7)(d).

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[3] *See* David Bradley and Iris J. Lav, "In a League of their Own: Colorado's TABOR and Ohio's Proposal are More Restrictive than Other Limits," Center on Budget and Policy Priorities at 2 (June 29, 2005) (available at http://www.cbpp.org/6-29-05slp.htm) (describing TABOR "[a]s the only constitutional [tax and expenditure limit] that restricts budget growth to population changes plus inflation and creates high barriers to override those limits") (hereinafter "In a League of their Own").

The question raised in this case—how the Colorado General Assembly should refund, in a constitutional manner, any "excess revenue" to the people—is thus a Colorado-specific issue. While other states have considered adopting a TABOR-like system,[4] no state (other than Colorado) has actually done it. Petitioners admit this. Petn. at 11 (suggesting that the issue "is important to Colorado taxpayers and taxpayers whose states are considering TABOR-style reform . . . ."). Petitioners argue that, even though the issue presented in the case is overwhelmingly Colorado-specific, "guidance" from this Court would still be helpful on general issues of tax policy, including "tax refund, tax rate deduction, or tax holiday legislation [in states other than Colorado] that affect different classes of residents and citizens of other states." Petn. at 12.[5] Colorado, they argue, is "not a model state to be followed concerning tax refunds." *Id.* But petitioners' warning to other states not to follow Colorado's lead merely confirms the Colorado-specific nature of this case. By definition, the issue raised by

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[4] *See, e.g.*, "In a League of their Own," *supra* n. 3 (discussing the proposal in Ohio).

[5] Petitioners cite provisions from Hawaii, Oregon, Missouri, and California. Petn. at 12. These statutes are quite different from TABOR in that they provide different limitations on government spending and different methods for determining refunds or credits. *Compare* Hawaii Const. art. VII, § 6 (providing that if the general fund balance at the close of each of two successive fiscal years exceeds five percent of the revenues for the two years, the legislature shall provide for a refund or credit "as provided by law") and Mo. Const. art. X, § 18 (establishing a "revenue limit" formula based on total state revenues divided by personal income in 1979, multiplied by the greater of personal income in either the prior calendar year or the average of the previous three calendar years, and requiring a pro rata refund based on reported state income tax liability), *with* Colo. Const. art. X, § 20(1) (providing that the maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population and that refunds may be made by "any reasonable method" and "need not be proportional when prior payments are impractical to identify or return").

petitioners does not rise to the level of an "important federal question," U.S. Sup. Ct. R. 10, and any consideration by this Court of the "excess revenue" issue would be premature.

Proof of the narrow and unique nature of the issue raised by petitioners is the fact there is only one published decision directly on point: the decision of the intermediate appellate court below. Petitioners cite no other case addressing the constitutionality of refunding "excess revenue." Not even the Colorado Supreme Court has opined on the issue, having denied certiorari in this case. Far from there being a split on the issue among federal courts, or between federal and state courts, U.S. Sup. Ct. R. 10(b), there simply are no decisions on the issue. Petitioners' reliance on this Court's grant of certiorari in *Saenz v. Roe*, 526 U.S. 489 (1999), is thus misplaced. Petn. at 11. In that case, two federal courts of appeal, two federal district courts, and two state supreme courts had considered the issue, all reaching the same result. 526 U.S. at 498 n. 9. By contrast, here the decision below is the *only* published decision on the issue. Again, any review by this Court would be premature.

II. The Decision Below Involves the Factbound Application of Well-Settled Constitutional Precedent

Although petitioners bring claims under the Privileges and Immunities Clause, the right to travel, the Equal Protection Clause, and the dormant Commerce Clause, their essential argument is the same: that the Colorado General Assembly impermissibly discriminated against non-residents and part-year residents when it refunded TABOR

"excess" to full-year residents only. Petn. at 13, 16, 20, and 23.[6] The Court of Appeals disagreed. After properly setting forth this Court's well-settled precedent, it applied that precedent to the facts of the case and found no unconstitutional discrimination. Because petitioners, in each of their claims, merely take issue with the factbound conclusions of the Court of Appeals, this Court should decline to review this case. U.S. Sup. Ct. R. 10 (noting that "[a] petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

A. Privileges and Immunities Clause

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The protections provided by the Clause, however, are "not absolute." *Saenz*, 526 U.S. at 502 (citation and internal quotation marks omitted). The Clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* (internal quotation marks omitted). It does not mandate that a state apply all laws or extend all services equally to anyone, resident or non-resident, who may request it to do so. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). Taxation is one area in which this Court has upheld "justified and reasonable distinctions between residents and nonresidents in the provision of tax benefits, whether in the form of tax deductions or tax credits." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 311 (1998).

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[6] As noted above, TABOR itself merely mandates that the "excess," if any, be refunded by any "reasonable method," leaving it to the General Assembly to figure out what that might be. Colo. Const. art. X, §§ 20(1) and (7)(d).

The Court of Appeals properly identified these principles. *See* 107 P.3d at 1068-69. It then went on to find that the Colorado General Assembly's decision to refund excess revenue to full-year residents was "justified and reasonable." *Id.* at 1069. It noted that, because the "excess revenue" stemmed "from many sources, including income and sales taxes, taxes on specific items, service and inspection fees, license and permit fees, rents, and interest on investment income," the state "could not identify and return a proportional amount to every person who paid a particular tax or fee"—a fact it found to be "undisputed." *Id.* at 1067-68. In other words, it was impossible to track the amount of various taxes that individuals—be they residents, non-residents, or part-year residents—paid in a given year. From this, the court concluded:

> The distinctions between full-year residents and others resulted not from an intent to discriminate, but rather from an effort to prescribe a timely refund of excess revenues to the people who paid most of the money into the revenue fund. . . . The [legislature] determined that full-year residents paid most of the taxes, and therefore, nonresidents and part-year residents are not similarly situated with full-year residents for purposes of the refund statutes. Thus, we conclude the distinctions were justified and reasonable.

Id. at 1069.

Petitioners take issue with this factbound conclusion by stating, without citation or factual support, that there were other alternatives available to the legislature. Petn. at 15.

The petitioners' unsupported assertions, however, do not cast doubt on the court's finding that the alternative chosen—that is, refunds to residents—was justified and reasonable.

Additionally, the petitioners misunderstand the legal standard set forth in this Court's caselaw. They state, again without citation, that the excess refund procedure violates the Privileges and Immunities Clause because it "facially discriminates" against part-year residents and non-residents. Petn. at 13 (heading A) and 14. Yet this Court, as noted above, has stated that such distinctions are permissible if they are "justified and reasonable." *Lunding*, 522 U.S. at 311. Likewise, petitioners claim that the Court of Appeals applied the "wrong standard" by focusing on *Lunding*'s "justified and reasonable" language instead of its "substantial basis" language. Petn. at 15-16. Yet the court below properly stated that the Privileges and Immunities Clause "bars discrimination against citizens of other states absent *substantial reason* for the discrimination beyond the mere fact that they are citizens of other states," 107 P.3d at 1068 (citing *Saenz*) (emphasis added), and thus plainly applied the proper standard.[7]

B. Right to Travel

The "right to travel" encompasses "at least three different components." *Saenz*, 526 U.S. at 500. As this Court stated in *Saenz*:

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcomed visitor rather

[7] Similarly, petitioners suggest that the court below ignored this Court's statement in *Austin v. New Hampshire*, 420 U.S. 656, 666 n. 10 (1975), that "something more is required than bald assertion" to justify disparate treatment between residents and others. Petn. at 14. But, as noted above, the court cited this very proposition as stated in *Saenz*.

> than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Id. Petitioners claim that they were denied the second and third components. Petn. at 21.

As for the second component, *Saenz* makes clear that the "welcomed visitor" protection—which covers "permissible justifications for discrimination between residents and nonresidents"— is provided for by the Privileges and Immunities Clause. 526 U.S. at 501-02. Petitioners' claim under this component is therefore duplicative of their Privileges and Immunities claim discussed above, and fails for the same reasons.

The third component, as noted above, applies to "travelers who elect to become permanent residents" of the particular state to which they have traveled. 526 U.S. at 500.[8] Importantly, petitioners cannot, by definition, claim a denial of this component of the right to travel because they do not claim to be permanent Colorado residents. Petn. at 6-7.

Moreover, as properly noted by the Court of Appeals, caselaw in this third category typically involves the "diminution of a basic necessity of life or an important right of citizenship based upon an individual's exercise of the right to travel." 107 P.3d at 1070. Examples cited by the court below include *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which this Court invalidated a one-year state residency requirement for eligibility for government assistance, and *Dunn v. Blumstein*, 405 U.S. 330 (1972),

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[8] This component, the Court has stated, has its roots in the Privileges and Immunities Clause of the 14th Amendment. *Saenz*, 526 U.S. at 503.

which invalidated a one-year state residency requirement to vote. *See also Saenz*, 526 U.S. at 506 (citing *Shapiro* and invalidating California's durational residency requirement to obtain full benefits).

Even if this third category were available to non-residents and part-year residents such as petitioners, the Court of Appeals correctly found that petitioners had failed to state a claim in this case. According to the Court of Appeals, petitioners:

> do not allege they were denied basic necessities or that they fell within a class of financially insecure persons who lack access to state-provided resources. Nor do they assert the refund statutes affected an important right of citizenship. Rather, [they] merely argue they were treated less favorably than full-year residents.

107 P.3d at 1070. They make the same insufficient allegation in their petition before this Court. Petn. at 21 (arguing that their right to travel was "burdened" and "penalized" because refunds went to other taxpayers). Again, petitioners simply challenge the Court of Appeals' conclusion that the facts as alleged do not state a claim for a violation of the right to travel as defined by this Court.

Petitioners also seem to make the argument that the first component of the right to travel was violated as well, suggesting that they were improperly penalized for leaving the state. Petn. at 22. But as the court below found, petitioners "make no specific allegation as to how the mere possibility of a future refund hindered their right to travel." 107 P.3d at 1070. There is no reason to believe that the

possibility of a future refund either motivated them to come to Colorado, or prevented them from leaving.

C. Equal Protection

For the most part, petitioners' equal protection claim is duplicative of their right to travel claim. *See, e.g.*, Petn. at 23 (referring to "a fundamental Right to Travel across State lines free of penalty or burden"). *See also Zobel v. Williams*, 457 U.S. 55, 60 n. 6 (1982) (noting that "right to travel analysis refers to little more than a particular application of equal protection analysis"). The Court of Appeals correctly found that, to the extent the claims are duplicative, they fail for the same reasons. 107 P.3d at 1071.

In the court below, petitioners argued for the creation of a "fundamental right to fair taxation," subject to strict scrutiny analysis. *Id.* The Court of Appeals declined to recognize such a right; to the contrary, it held that " 'legislatures possess the greatest freedom in classification' " in tax matters. *Id.* (citing *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). The court went on to apply rational basis scrutiny to the excess refund provision, and found the standard easily met. 107 P.3d at 1071-72. As the court concluded:

> Here, the legislature was mandated by the Colorado Constitution to refund the surplus tax revenue. In crafting the refund mandated by TABOR, the [legislature] sought to address this legitimate state interest by refunding the surplus to those persons who had contributed most substantially to the surplus. Therefore, . . . it had a rational basis for refunding excess revenue to full-year residents. . . .

> Thus, we find no equal protection violation.

Id. at 1072.

In their submission to this Court, petitioners do not present the argument that they possess a "fundamental right to fair taxation." Instead, they attack the Court of Appeals' conclusion that the excess revenue refund provision is supported by a rational basis. Petn. at 24. At bottom, the petitioners challenge the application of the rational basis standard, not the standard itself. Additionally, they fundamentally misunderstand what is meant by the rational basis test. For example, they argue that Colorado's refund method should be struck down because there were other alternatives available to the legislature, including their preferred alternative of rate reduction. Petn. at 25. But under the rational basis standard, the state does not have to exclude other alternatives; it merely has to provide a rational basis for the one it did choose. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (*per curiam*).

D. Dormant Commerce Clause

This Court has "consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce . . . among the several States' . . . contains a further, negative command, known as the dormant Commerce Clause. . . ." *American Trucking Associations, Inc. v. Michigan Public Service Comm'n*, ___ U.S. ___, 125 S. Ct. 2419, 2422 (2005) (citing U.S. Const. art. I, § 8, cl. 3; other citations and internal quotation marks omitted). This dormant aspect of the Commerce Clause creates "an area of trade free from interference by the States." *Id.* The main evil the dormant Commerce Clause seeks to eradicate is "economic protectionism—that is, regulatory measures

designed to benefit in-state economic interests by burdening out of state competitors." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (citation and internal quotation marks omitted). The dormant Commerce Clause is not implicated, however, unless the state statute in question "discriminates against interstate commerce." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 576 (1997).

The Court of Appeals correctly found that the excess revenue provision in this case did not discriminate against interstate commerce. It noted that it does "not limit or restrict in any way [petitioners'] ability to access the markets in Colorado," nor "impair[] [their] access to interstate commerce." 107 P.3d at 1073. That is because they "could not have known whether there would be any refund when they did business in Colorado . . . ." *Id.* *See* Colo. Const. art. X § 20(7)(d) (providing that any "excess" revenue be refunded the fiscal year after it is collected). In other words, the refund provision did not discourage them from engaging in, or penalize their engagement in, interstate commerce. This fact is fatal to their claim. *Contrast Camps Newfound/Owatonna, Inc.*, 520 U.S. at 576 (tax exemption at issue "sing[ed] out camps that serve mostly in-staters for beneficial tax treatment, and penaliz[ed] those camps that do a principally interstate business"). Again, petitioners are merely attacking the Court of Appeals' factbound application of settled precedent.

Petitioners point to the fact they did indeed suffer some economic harm—namely, the fact that they did not receive a refund. Petn. at 17-18.[9] But suffering economic harm in and of itself is not enough; the harm must impede

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[9] The Court of Appeals mistakenly described this economic harm as an "incidental burden *on interstate commerce*," 107 P.3d at 1073 (emphasis added), but later in the opinion appropriately described it as "a small burden imposed *on [petitioners]*." *Id.* (emphasis added).

the flow of interstate commerce. Similarly, petitioners take the position that *any* distinction drawn between residents and non-residents for purposes of tax treatment violates the dormant Commerce Clause. Petn. at 18 (suggesting that since the excess refund provision "discriminates on its face," it is invalid). As noted above, this Court has sustained such distinctions where they are justified and reasonable. Petitioners' mistake is to claim that "facial discrimination"—in the abstract—implicates the dormant Commerce Clause. Petn. at 18. But as this Court made plain in *Camps Newfound/Owatonna*, the *per se* invalidity standard applies only to "State laws discriminating *against interstate commerce* on their face." 520 U.S. at 575 (emphasis added). As the Court of Appeals correctly found, petitioners failed to show such discrimination against interstate commerce occurred in this case.

CONCLUSION

Petitioners argue that, as part-year residents and non-residents, they suffered unconstitutional discrimination when they did not receive a refund of excess revenue given to full-year Colorado residents. The Colorado Court of Appeals denied their claims. This Court should deny petitioners' request to review that ruling because the question at issue is Colorado-specific and because the court below properly applied this Court's well-settled precedents to the facts of this case.

Respectfully submitted,

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RESPONDENTS' APPENDIX 1

Constitution of the State of Colorado [1876]
Article X.
§ 20. The Taxpayer's Bill of Rights,

(1) General provisions. This section takes effect December 31, 1992 or as stated. Its preferred interpretation shall reasonably restrain most the growth of government. All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions. Other limits on district revenue, spending, and debt may be weakened only by future voter approval. Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution. Successful plaintiffs are allowed costs and reasonable attorney fees, but a district is not unless a suit against it be ruled frivolous. Revenue collected, kept, or spent illegally since four full fiscal years before a suit is filed shall be refunded with 10% annual simple interest from the initial conduct. Subject to judicial review, districts may use any reasonable method for refunds under this section, including temporary tax credits or rate reductions. Refunds need not be proportional when prior payments are impractical to identify or return. When annual district revenue is less than annual payments on general obligation bonds, pensions, and final court judgments, (4)(a) and (7) shall be suspended to provide for the deficiency.

(2) Term definitions. Within this section:

(a) "Ballot issue" means a non-recall petition or referred measure in an election.

(b) "District" means the state or any local government, excluding enterprises.

(c) "Emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases.

(d) "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

(e) "Fiscal year spending" means all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales.

(f) "Inflation" means the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(g) "Local growth" for a non-school district means a net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property. For a school district, it means the percentage change in its student enrollment.

(3) Election provisions.

(a) Ballot issues shall be decided in a state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years. Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot issues and voters may approve a delay

of up to four years in voting on ballot issues. District actions taken during such a delay shall not extend beyond that period.

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to "All Registered Voters" at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1(7.5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: **"NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A REFERRED MEASURE."** Except for district voter-approved additions, notices shall include only:

(i) The election date, hours, ballot title, text, and local election office address and telephone number.

(ii) For proposed district tax or bonded debt increases, the estimated or actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar change.

(iii)For the first full fiscal year of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase.

(iv) For proposed district bonded debt, its principal amount and maximum annual and total district repayment cost, and the principal balance of total current district bonded debt and its maximum annual and remaining total district repayment cost.

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1(7.5) of article V of this constitution.

(c) Except by later voter approval, if a tax increase or fiscal year spending exceeds any estimate in (b)(iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined dollar excess, and the combined excess revenue refunded in the next fiscal year. District bonded debt shall not issue on terms that could exceed its share of its maximum repayment costs in (b)(iv). Ballot titles for tax or bonded debt increases shall begin, **"SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?" or "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district costs),...?"**

(4) Required elections. Starting November 4, 1992, districts must have voter approval in advance for:

(a) Unless (1) or (6) applies, any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.

(b) Except for refinancing district bonded debt at a lower interest rate or adding new employees to existing district pension plans, creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years.

(5) Emergency reserves. To use for declared emergencies only, each district shall reserve for 1993 1% or more, for 1994 2% or more, and for all later years 3% or more of its fiscal year spending excluding bonded debt service. Unused reserves apply to the next year's reserve.

(6) Emergency taxes. This subsection grants no new taxing power. Emergency property taxes are prohibited. Emergency tax revenue is excluded for purposes of (3)(c) and (7), even if later ratified by voters. Emergency taxes shall also meet all of the following conditions:

(a) A 2/3 majority of the members of each house of the general assembly or of a local district board declares the emergency and imposes the tax by separate recorded roll call votes.

(b) Emergency tax revenue shall be spent only after emergency reserves are depleted, and shall be refunded within 180 days after the emergency ends if not spent on the emergency.

(c) A tax not approved on the next election date 60 days or more after the declaration shall end with that election month.

(7) Spending limits. (a) The maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar

year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census.

(b) The maximum annual percentage change in each local district's fiscal year spending equals inflation in the prior calendar year plus annual local growth, adjusted for revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(c) The maximum annual percentage change in each district's property tax revenue equals inflation in the prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 and (8)(b) and (9) reductions.

(d) If revenue from sources not excluded from fiscal year spending exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset. Initial district bases are current fiscal year spending and 1991 property tax collected in 1992. Qualification or disqualification as an enterprise shall change district bases and future year limits. Future creation of district bonded debt shall increase, and retiring or refinancing district bonded debt shall lower, fiscal year spending and property tax revenue by the annual debt service so funded. Debt service changes, reductions, (1) and (3)(c) refunds, and voter-approved revenue changes are dollar amounts that are exceptions to, and not part of, any district base. Voter-approved revenue changes do not require a tax rate change.

(8) Revenue limits. (a) New or increased transfer tax rates on real property are prohibited. No new state real property tax or local district income tax shall be imposed. Neither an income tax rate increase nor a new state definition of

taxable income shall apply before the next tax year. Any income tax law change after July 1, 1992 shall also require all taxable net income to be taxed at one rate, excluding refund tax credits or voter-approved tax credits, with no added tax or surcharge.

(b) Each district may enact cumulative uniform exemptions and credits to reduce or end business personal property taxes.

(c) Regardless of reassessment frequency, valuation notices shall be mailed annually and may be appealed annually, with no presumption in favor of any pending valuation. Past or future sales by a lender or government shall also be considered as comparable market sales and their sales prices kept as public records. Actual value shall be stated on all property tax bills and valuation notices and, for residential real property, determined solely by the market approach to appraisal.

(9) State mandates. Except for public education through grade 12 or as required of a local district by federal law, a local district may reduce or end its subsidy to any program delegated to it by the general assembly for administration. For current programs, the state may require 90 days notice and that the adjustment occur in a maximum of three equal annual installments.

RESPONDENTS' APPENDIX 2

C.R.S. 39-22-120

(1) The general assembly hereby finds and declares that:

(a) Section 20 of article X of the state constitution, which was approved by the registered electors of this state in 1992, limits the annual growth of state fiscal year spending;

(b) During the 1997-98 fiscal year, state revenues from sources not excluded from state fiscal year spending exceeded the limitation on state fiscal year spending;

(c) When revenues exceed the state fiscal year spending limitation for any given fiscal year, section 20(7)(d) of article X of the state constitution requires that the excess revenues be refunded in the next fiscal year unless voters approve a revenue change allowing the state to keep the revenues;

(d) In addition, section 20(1) of article X of the state constitution states that refunds need not be proportional when prior payments are impractical to identify or return and authorizes the use of any reasonable method for refunding excess revenues;

(e) The state is required to refund during the 1998-99 fiscal year all revenues in excess of the state fiscal year spending limitation for the 1997-98 fiscal year; except that, if at the 1998 general election voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, the state is required to refund only that portion of the state excess revenues for the 1997-98 fiscal year that the voters have not authorized the state to

retain;

(f) It is within the legislative prerogative of the general assembly to enact legislation to implement the refund of state excess revenues for the 1997-98 fiscal year in compliance with section 20 of article X of the state constitution;

(g) It is a reasonable and necessary exercise of the legislative prerogative to determine that, due to the impossibility of identifying or returning prior payments, it is not feasible to make proportional refunds of state excess revenues;

(h) It is also a reasonable and necessary exercise of the legislative prerogative to determine what constitutes a reasonable method of refunding state excess revenues after consideration of the best information available at the time regarding: The amount and source of excess revenues to be refunded; the qualifications for and number of eligible recipients; the amount of refund each recipient should receive; the necessary procedures to claim and make refunds; and the related administrative expenses;

(i) It is the considered judgment of the general assembly that:

(I) The state excess revenues for the 1997-98 fiscal year are derived from a wide variety of state taxes and fees ranging from state sales tax to severance and transportation taxes to health service fees to court fines to permit and license fees and to higher education fees and should, therefore, be returned to as large a group of Colorado residents as is identifiable and economically feasible;

(II) It is not feasible to make proportional refunds of state excess revenues for the 1997-98 fiscal year due to the impossibility of identifying or returning prior payments;

(III) It is reasonable and fair to refund state excess revenues for the 1997-98 fiscal year to a large group of individuals as a refund of state sales tax revenues since more Coloradans pay state sales tax than any other state tax;

(IV) The state collected over one billion four hundred fourteen million dollars in state sales tax revenues during the 1997-98 fiscal year from which the refund of state excess revenues may be made;

(V) Refunding state excess revenues for the 1997-98 fiscal year through the state income tax system in the manner set forth in this section is a reasonable method for refunding such excess revenues; and

(VI) The most cost-effective and expeditious method of refunding state excess revenues for the 1997-98 fiscal year is through the state income tax system but that a refund offset against state income tax liability is merely a mechanism for refunding said state excess revenues to a broad spectrum of persons.

(2)(a) As used in this section, "qualified individual" means:

(I) A natural person who is domiciled in this state for the entire taxable year commencing on January 1, 1998, and ending December 31, 1998, and who is required to file a Colorado individual income tax return for that tax year pursuant to section 39-22-601(1)(a) or who files a Colorado individual income tax return to claim a refund of Colorado income tax withheld from wages for that tax year; or

(II) Any natural person who is domiciled in this state for the entire taxable year commencing on January 1, 1998, and ending December 31, 1998, and who is at least eighteen years of age as of December 31, 1997; or

(III) A natural person who died during the taxable year commencing on January 1, 1998, and ending December 31, 1998, who was domiciled in this state from January 1, 1998, until the date of death, and whose estate or spouse is required to file a Colorado individual income tax return for that tax year pursuant to section 39-22-601(1)(a) or whose estate or spouse files a Colorado income tax return to claim a refund of Colorado income tax withheld from wages for that tax year; or

(IV) A natural person who died during the taxable year commencing on January 1, 1998, and ending December 31, 1998, who was domiciled in this state from January 1, 1998, until the date of death, and who was at least eighteen years of age as of December 31, 1997.

(b) "Qualified individual" does not include:

(I) Any natural person who was convicted of a felony and who served a sentence of incarceration in a correctional facility operated by or under contract with the department of corrections or in a county or municipal jail awaiting transfer to the department of corrections pursuant to section 16-11-308, C.R.S., or in both such facility and jail for a total of one hundred eighty days or more during the 1997-98 fiscal year, regardless of whether such person meets the qualifications set forth in paragraph (a) of this subsection (2);

(II) Any natural person who is convicted of a misdemeanor or is adjudicated for an offense that would constitute a misdemeanor if committed by an adult and who is incarcerated in a county or municipal jail for a total of one hundred eighty days or more during the 1997-98 fiscal year, regardless of whether such person meets the qualifications set forth in paragraph (a) of this subsection (2);

(III) Any person under eighteen years of age who is

adjudicated for an offense that would constitute a felony if committed by an adult and who was committed to the department of human services for a total of one hundred eighty days or more during the 1997-98 fiscal year, regardless of whether such person meets the qualifications set forth in paragraph (a) of this subsection (2).

(3) With respect to the taxable year commencing on January 1, 1998, and ending December 31, 1998, there shall be allowed to each qualified individual a state sales tax refund in an amount specified in subsection (4) of this section with respect to the income taxes imposed by this article.

(4) The amount of the refund allowed under this section shall be as follows:

(a) For a qualified individual filing a single return for the 1998 tax year:

(I) If the qualified individual's federal adjusted gross income for the 1998 tax year is less than or equal to twenty thousand dollars, the refund shall be in the amount of one hundred forty-two dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of ninety-two dollars;

(II) If the qualified individual's federal adjusted gross income for the 1998 tax year is greater than twenty thousand dollars but not more than fifty thousand dollars, the refund shall be in the amount of one hundred ninety-five dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of one hundred twenty-six dollars;

(III) If the qualified individual's federal adjusted gross

income for the 1998 tax year is greater than fifty thousand dollars but not more than ninety-five thousand dollars, the refund shall be in the amount of two hundred seventy-six dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of one hundred seventy-eight dollars;

(IV) If the qualified individual's federal adjusted gross income for the 1998 tax year is greater than ninety-five thousand dollars, the refund shall be in the amount of three hundred eighty-four dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of two hundred forty-eight dollars;

(b) For two qualified individuals filing a joint return for the 1998 tax year:

(I) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is less than or equal to twenty thousand dollars, the refund shall be in the amount of two hundred eighty-four dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of one hundred eighty-four dollars;

(II) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is greater than twenty thousand dollars but not more than fifty thousand dollars, the refund shall be in the amount of three hundred ninety dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund

shall be in the amount of two hundred fifty-two dollars;

(III) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is greater than fifty thousand dollars but not more than ninety-five thousand dollars, the refund shall be in the amount of five hundred fifty-two dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of three hundred fifty-six dollars;

(IV) If the qualified individuals' aggregate federal adjusted gross income for the 1998 tax year is greater than ninety-five thousand dollars, the refund shall be in the amount of seven hundred sixty-eight dollars, unless, at the 1998 general election, voters statewide approve House Bill 98-1256, enacted at the second regular session of the sixty-first general assembly, in which case the refund shall be in the amount of four hundred ninety-six dollars.

(5)(a)(I) Except as otherwise provided in subparagraph (II) of this paragraph (a), any refund allowed pursuant to this section shall be claimed by a qualified individual as defined in subparagraph (I) or (III) of paragraph (a) of subsection (2) of this section by filing a 1998 income tax return with the department of revenue no later than April 15, 1999.

(II) Any refund allowed pursuant to this section shall be claimed by a qualified individual as defined in subparagraph (I) or (III) of paragraph (a) of subsection (2) of this section who is granted an extension of time to file a 1998 income tax return by filing a 1998 income tax return with the department of revenue no later than October 15, 1999. Such qualified individual shall not be required to pay all or any portion of the qualified individual's net tax liability due prior to October

15, 1999, in order to be granted an extension of time to file said tax return; except that, pursuant to section 39-22-621, such qualified individual may be subject to a late payment penalty and interest on any net income tax liability not paid by April 15, 1999.

(III) The department of revenue shall not allow said refund claimed on any 1998 income tax return not filed in compliance with the provisions of this article. In no event shall the refund claimed by a qualified individual as defined in subparagraph (I) or (III) of paragraph (a) of subsection (2) of this section on any 1998 income tax return be:

(A) Disallowed if said return is filed on or before October 15, 1999; and

(B) Allowed if said return is filed after October 15, 1999.

(b) Any refund allowed pursuant to this section shall be claimed by a qualified individual as defined in subparagraph (II) or (IV) of paragraph (a) of subsection (2) of this section by filing a 1998 income tax return with the department of revenue no later than April 15, 1999. The department of revenue shall not allow said refund claimed by a qualified individual as defined in subparagraph (II) or (IV) of paragraph (a) of subsection (2) of this section on any 1998 income tax return filed with the department of revenue after April 15, 1999.

(c)(I) Notwithstanding any provision of paragraph (b) of this subsection (5) to the contrary, a qualified individual as defined in subparagraph (II) or (IV) of paragraph (a) of subsection (2) of this section who claims a property tax assistance grant pursuant to section 39-31-101 or a heat or fuel expenses assistance grant pursuant to section 39-31-104 may claim a refund authorized by this section on the assistance grant application form described in section 39-31-

102(2). Claiming a refund on such assistance grant application form shall be in lieu of claiming the refund on an income tax return pursuant to paragraph (b) of this subsection (5). Any refund claimed pursuant to this paragraph (c) shall be claimed on or before April 15, 1999.

(II) The department of revenue shall not allow a refund authorized by this section that is claimed on an assistance grant application form if:

(A) The assistance grant application form is filed after April 15, 1999; or

(B) The qualified individual has claimed the refund authorized by this section on an income tax form filed in accordance with paragraph (b) of this subsection (5) for the tax year for which the refund is allowed.

(5.5)(a) The department of revenue shall make a state sales tax refund of excess revenues for the 1996-97 fiscal year to any qualified individual, as defined in paragraph (a) of subsection (2) of this section as said section existed for purposes of refunding excess revenues for the 1996-97 fiscal year and prior to the amendments to said section contained in House Bill 98S-1003, enacted at the second extraordinary session of the sixty-first general assembly, who, pursuant to a rule of the department of revenue, was not allowed such state sales tax refund because of the failure to pay all or any portion of such qualified individual's net tax liability due prior to a certain date.

(b) The department of revenue shall notify each qualified individual described in paragraph (a) of this subsection (5.5) of the allowance of such refund and make payment of such refunds to such qualified individuals no later than September 30, 1999.

(c) The amount of any state sales tax refund made pursuant to this subsection (5.5) that is outstanding for more than six months after the date such refund was issued to the taxpayer by the department of revenue shall be added to and refunded with the state excess revenues pursuant to section 39-22-120.5.

(6) If the refund allowed under this section exceeds the income taxes otherwise due on the claimant's income, the amount of the refund not used as an offset against income taxes may not be carried forward as an offset against subsequent years' income tax liability and shall be refunded to the claimant.

(7) In addition to any other penalties allowed by law, any person who claims but is not eligible to claim the refund allowed pursuant to this section shall be subject to the criminal penalties imposed pursuant to section 39-21-118, as applicable.

(8) The state sales tax refund allowed to any qualified individual under this section shall not be reported by the department of revenue as a payment of a refund, credit, or offset of state income taxes to such qualified individual in any information return required to be filed pursuant to federal law.

(9) The executive director shall not print individual income tax forms for the 1998 taxable year until the results of the 1998 general election are known so that forms will reflect the impact of the results of said election on the amount of the refund to be allowed in accordance with subsection (4) of this section.

(10) The department of revenue shall identify any qualified individual who has been convicted of a felony and who, at the time of filing for a refund pursuant to this section, is

incarcerated in a correctional facility operated by or under contract with the department of corrections or in a county or municipal jail awaiting transfer to a correctional facility pursuant to section 16-11- 308, C.R.S. The department of revenue shall transfer the amount of any refund owed to said qualified individual to the department of corrections. The department of corrections shall transmit the amount of said refund to the clerk of the district court which issued an order for payment of restitution or an order for costs pursuant to section 18-1.3-701, C.R.S. Such refund shall be credited in the priority specified in section 16-11-101.6(1), C.R.S.

(11) The department of corrections, the department of human services, and each county of the state, to the extent each such county has the capability within existing resources, shall provide in a timely manner the information requested by the department of revenue necessary to identify the persons specified in paragraph (b) of subsection (2) of this section and in subsection (10) of this section. The information shall be provided in the form requested by the department of revenue. The department of revenue shall maintain the confidentiality of any social security number received pursuant to this subsection (11).

No. 04-1541

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN K. THORPE, ELISHA E. SPRONG, DARRELL J. VIGIL, SEAN P. LEY, AND HECTOR JUAREZ, ON BEHALF OF THEMSELVES AND A PROPOSED CLASS OF ALL OTHER TAXPAYERS SIMILARLY SITUATED,

Petitioners,

v.

STATE OF COLORADO AND M. MICHAEL COOKE, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF REVENUE AND TAX COLLECTOR, IN HIS OFFICIAL CAPACITY, AND HIS SUCCESSORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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ARGUMENT

Respondents flatly concede the fundamental point that makes this case appropriate for Supreme Court review: Colorado's taxing regime discriminates on its face against Lesser Residents[1] and Non-Residents by limiting *exclusively* to Preferred Residents a refund of taxes paid by *all* Colorado taxpayers (including Non-Residents and Lesser Residents). *See* Br. at 2. Because such conceded discrimination is profoundly offensive to our Constitution and runs counter to established precedent, Respondents devote their opposition to an effort to marginalize the case, suggesting that it is "unique." As demonstrated below, this case is no more "unique" constitutionally than the typical controversy involving a state's tax discrimination against non-residents. More importantly, however, Respondents fail to address the fundamental, substantive claim in this case, namely that Colorado discriminates against Non-Residents and Lesser Residents when less costly, more efficient and non-discriminatory methods are available to achieve the State's objective under TABOR. Pet., App. B at 43a.

I. This Case Is Not "Unique" In The Constitutional Sense

Colorado's discrimination here is fundamental and incontrovertible. Respondents nevertheless argue that review of this case is inappropriate because it is "unique." (Br. at 3-5) This case, however, is indistinguishable from many other state cases involving statutes discriminating against nonresidents that have been struck by this Court. *See, e.g., Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870) (declaring unconstitutional a discriminatory tax on nonresident merchants); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) (striking a New York statute that denied to nonresidents personal tax exemptions provided

1. The defined terms herein are incorporated by reference from the Petition ("Pet."); *see, e.g.*, Pet. at 3, 7.

to residents); *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking a state statute that required non-resident fishermen to pay higher license fees than residents); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (striking state tax that increased net tax paid by nonresidents without increasing net tax paid by residents), and *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998) (striking a state statute that allowed residents an alimony deduction while denying to non-residents the same tax benefit).

What makes this case worthy of review is that same common thread that made all of the foregoing cases worthy of review: it represents an "entering wedge" of discrimination. As Chief Judge Cardozo wisely observed, when writing for the New York Court of Appeals, in striking a discriminatory tax statute:

> The principle of equal treatment for the citizens of all the States is a good deal more precious than the gain of revenue in one year or another. We are not to whittle it down by refinement of exception or by the implication of a reciprocal advantage that is merely trivial or specious. The principle is put in jeopardy — there is set in it an entering wedge that may be the beginning of its destruction — if this statute is upheld.

Smith v. Loughman, 245 N.Y. 486, 496-97, 157 N.E. 753, 757, *cert. denied*, 275 U.S. 560 (1927) With this fundamental principle as a guiding light, it is apparent that Respondents' effort to divert the Court's attention from the fundamental issue in this case must fail. The issue in this case is not Colorado's "unique" "Budgeting System" (Br. at 3-5) — presumably every state has a somewhat "unique" system. Rather, the fundamental issue is whether Preferred Residents enjoy a tax benefit that Lesser Residents and Non-Residents do not have the same privilege of enjoyment because of the existence or length of residency requirements. Petitioners have demonstrated — and

Respondents concede — that discrimination exists. The only question then is whether Respondents proffered justification passes constitutional muster. As demonstrated below, it does not. If the decision below is allowed to stand, states (and municipalities) will be encouraged to discriminate against nonresidents in countless "unique" ways limited only by the imagination of state legislators. In summary, discrimination always arises in a particular statutory or factual context, but that does not legitimize it.

II. Respondents' Privileges And Immunities Clause Argument Is Irreconcilable With *Lunding v. New York Tax Appeals Tribunal*

Discriminatory taxation of Lesser Residents and Non-Residents — the incontrovertible fact that lies at the heart of this case — is unconstitutional under the Privileges and Immunities Clause unless the State can demonstrate a "substantial reason for the discrimination beyond the mere fact that they are citizens of other states" (*Toomer*, 334 U.S. at 396, 399) and that "'the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Lunding*, 522 U.S. at 298, quoting *Supreme Court of N. H. v. Piper*, 470 U.S. 274, 284 (1985). Respondents fail to demonstrate that either one standard or the other has been met. Precisely because Respondents fail to demonstrate that Lesser Residents and Non-Residents constitute a particular or exclusive source of evil or danger to the State, there can be no "substantial reason" to overcome the admitted discrimination. *See Toomer*, 334 U.S. at 396-399; *Lunding*, 522 U.S. at 298, and *Hicklin v. Orbeck*, 437 U.S. 518, 525-26 (1978) (striking state statute giving hiring preferences to Alaska residents to work on Alaska pipelines)[2] This, among others, is a fatal defect in Respondent's position.

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2. It is noteworthy that the Alaska Supreme Court had previously held that the state's one year durational residency requirement was unconstitutional under the Equal Protection Clause. *Hicklin*, at 522-523.

Indeed, this case is squarely controlled by the Court's decision in *Lunding v. New York Tax Appeals Tribunal, supra*, which struck down under the Privileges and Immunities Clause a New York statute that allowed residents an alimony deduction while denying nonresidents any tax deduction. There is no question that a "complete denial" to non-residents of the same tax benefit enjoyed by residents is unconstitutional. *Id.* at 307. That principle is applicable here. Respondents' purported justification for the "complete denial" to Non-Residents and Lesser Residents of the tax benefit enjoyed by Preferred Residents is far less "substantial" than the justifications that this Court flatly rejected in *Lunding*, 522 U.S. 287. The justification that Respondents proffer is the difficulty of "track[ing] the amount of various taxes that individuals . . . paid in a given year. Br. at 7. But this difficulty is not a "substantial reason" for the *complete denial* to Non-Residents and Lesser Residents of the same tax benefit enjoyed by Preferred Residents, especially when that so-called difficulty also would apply to Preferred Residents.[3] There is simply nothing about the administrative difficulty in identifying all the taxpayers who contributed to tax revenues which makes it constitutional to discriminate based on the existence or length of residency.

Even if Respondents could find some legitimate administrative justification for the discrimination, that would not save it. A discriminatory tax

> "[c]lassification may be supported by many considerations of expediency or fairness and, nonetheless, may be illegal if it denies to the citizens

3. Lesser Residents and Non-Residents are in the same position as Preferred Residents regarding the State's proffered justification. Most Lesser Residents (nearly 210,000) and many Non-Residents (nearly 78,000) are required to file income tax returns with and pay income tax to the State. *See* Pet. at 8, 18, 25. Lesser Residents and Non-Residents are also required to pay State sales tax. *Id.*; *see also* Pet., App. G at 68a-69a.

> of any State the privileges and immunities that belong to citizens of another. To put it differently, equality in such circumstances is itself the highest policy, to which other policies must bow."

Borden v. Selden, 259 Iowa 808, 815, 146 N.W. 2d 306, 312 (1966) (striking down a state statute granting tax credits to Iowa-resident property owners and not also to non-resident property owners), quoting *Smith v. Loughman*, *supra*, 245 N.Y. at 491, 157 N.E. at 755.

Further, there is no "substantial relationship" between the TABOR (State) objective and the discrimination practiced because: (1) The District Court explicitly found that "[o]f the alternative methods considered by the State, the method of refund selected is neither the least costly nor the most administratively convenient." Pet., App. B, at 43a; (2) Although across-the-board tax rate reductions or credits, as expressly suggested by TABOR, may not be proportional in every instance, they evidence TABOR's intent to be non-discriminatory as a general rule; and (3) This is not a case where there is isolated or incidental discrimination as the result of some legitimate practice. This is a case where the practiced discrimination operates as a pervasive, general rule. *See Travis,* 252 U.S. at 80-81.

In short, the TABOR (State) objective could have been accomplished by alternative, non-discriminating methods. Because there are more economical, efficient, and non-discriminatory methods[4] of reducing or refunding tax revenues under TABOR, and that Non-Residents and Lesser Residents

4. In addition to across-the-board tax rate reductions or tax credits, another method, among others, of a less discriminatory Sales Tax Refund would be for the State to refund excess revenues to all residents and non-residents who filed income tax returns, upon which the Sales Tax Refund was based, or verified applications with the State.

are not a "source of the evil" that the discrimination purportedly addresses, there is no constitutional basis for finding that (a) there is a "substantial reason" for the discrimination, and (b) there is a "substantial relationship" between the TABOR objective and the discrimination practiced.

III. Respondents' Commerce Clause Argument Is Nonsensical

Respondents have no meaningful response to Petitioners' fundamental Commerce Clause claim that the Sales Tax Refund Statute discriminates against interstate commerce by favoring Preferred Residents at the expense of Lesser Residents and Non-Residents. The reason is that Colorado's refund procedure is a quintessential Commerce Clause violation of a type that the Court has consistently struck down. Respondents argue that even though Petitioners "did indeed suffer . . . economic harm," Br. at 13, this harm does not rise to the level of a prohibited burden because they "could not have known whether there would be any refund when they did business in Colorado," (*id.*, quoting Court of Appeals), and thus could not have protected themselves from it. No case, however, has ever sanctioned a burden or penalty on interstate commerce because those subject to it could not protect themselves. The fact that Respondents seek to justify the discrimination with the assertion that unwitting taxpayers "couldn't have seen it coming" evidences a dismaying lack of regard for the Commerce Clause and only underscores the need for this Court's intervention.

IV. Respondents' Right To Travel Argument Is Misplaced

The Sales Tax Refund Statute unquestionably penalizes the constitutional right of interstate travel. It penalizes traveling to relocate one's residence out of Colorado before year-end; it penalizes living in another state and traveling to Colorado to

work; and it penalizes taxpayers who travel to Colorado to reside permanently there because they are not treated like other citizens until they have resided in Colorado for at least one full-calendar year. Thus, it could be nearly 24 consecutive months before these taxpayers become eligible to receive a Sales Tax Refund. Pet. at 5-6.

Respondents' contention that discriminatory taxation of Lesser Residents and Non-Residents is not "important" (Br. at 9, quoting Court of Appeals) enough to implicate the Right to Travel is remarkable. Taxes are vitally important to every citizen, as evidenced by the fact that Colorado enacted TABOR. Taxes are one of the principal means of implementing social policy at every level of government and provide incentives to citizens as they move about the country. This Court has long recognized that the Right to Travel free of penalty in the form of a discriminatory tax is unconstitutional. *Crandall v. Nevada*, 73 U.S. 35 (1868).

V. Respondents' Equal Protection Clause Argument Lacks Merit

Respondents essentially argue that there is no equal protection violation because the State had a need to refund, and thus a legitimate "interest" in refunding, the excess revenues. Br. at 11-12, quoting Court of Appeals[5] The "need" to reduce or refund excess revenues does not give rise to a corresponding constitutional "need" to discriminate based on the existence or length of residency. This is especially so because there are any number of residence-neutral methods for complying with TABOR. *See* Pet. at 5, 43a. Colorado's inability to identify every taxpayer who contributed to the excess revenues does not compel, or even suggest, resorting to a discriminatory, residence-

5. Respondents mis-characterize Petitioners' position under the Equal Protection Clause. *See* Pet. at 23-26.

based refund scheme.[6] Colorado's residence-based scheme is a function of nothing more than Colorado's desire to benefit its Preferred Residents at the expense of Lesser Residents and Non-Residents, especially since the State has the name and address of each Lesser Resident and Non-Resident, just like each Preferred Resident, who pays Colorado income taxes. The State has no legitimate interest in benefitting Preferred Residents at the expense of Lesser Residents and Non Residents based on the existence or length of residency. As this Court has long recognized, "[t]he Equal Protection clause prohibits . . . apportionment of state services" on the basis of length of residency. *See Zobel v. Williams*, 457 U.S. 55, 63 (1982), quoting *Shapiro v. Williams*, 394 U.S. 618, 632-33 (1969).[7]

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6. It is important that TABOR does not necessarily require tax refunds, as the constitutional amendment specifically suggests that non-discriminatory rate reductions and tax credits to achieve its objective. *See* Pet. at 5. Colorado chose a discriminatory refund among many options at its disposal.

7. Lesser-Residents who travel from other states to Colorado to reside permanently there are not treated like Preferred Residents under Colorado's tax regime until they have resided in Colorado for at least one full-calendar year, which means it could be nearly 24 consecutive months in the State before they are "qualified" to receive a Sales Tax Refund, although they pay taxes to the State from day one. *See* Pet. at 5-6, 25.

CONCLUSION

For the foregoing reasons, the judgment below of the Court of Appeals of Colorado should be reversed and the Sales Tax Refund Statute (C.R.S. § 39-22-120) should be stricken under the Constitution of the United States.

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Respectfully submitted,

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